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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 2226 (TCC)

No. HT-2018-000031 /
HT-2019-000414

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 4 August 2020

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

STONEWATER LIMITED

Claimant

- and -

BAM CONSTRUCTION LIMITED

Defendant

A N D B E T W E E N :

STONEWATER LIMITED

Claimant

- and -

RPS DESIGN LIMITED

Defendant

MR N. BAATZ QC (instructed by DAC Beachcroft LLP) appeared on behalf of the Claimant.

MR M. ROWLANDS QC and MR T. OWEN (instructed by Browne Jacobson LLP) appeared on behalf of the Defendant (BAM Construction Limited).

MR B. PATTEN QC (instructed by Beale & Company Solicitors LLP) appeared on behalf of the Defendant (RPS Design Limited).

J U D G M E N T

(Please note this transcript has been prepared without the aid of documentation)

MRS JUSTICE O'FARRELL:

- 1 These claims arise out of the design and construction of two residential blocks of flats at Harbour Court and Harbour Sail in Poole, Dorset. The claimant, in each of the two claims before the court, is Stonewater Limited, a social housing association and the leasehold owner of the development. In the first claim, that is HT-2018-000031, the defendant is BAM Construction Limited who has taken over the obligations and liabilities of the contractor of the residential blocks under a deed of warranty. In the second action, that is HT-2019-000414, the defendant is RPS Design Limited who has taken over the obligations and liabilities in respect of the architect for the residential blocks under a separate deed of warranty.
- 2 There are two disputed applications before the court today:
 - i) the first is an application by Stonewater for the two separate actions to be tried together;
 - ii) the second is an application by RPS, the defendant in action 414, for a preliminary issue to be determined in those proceedings.
- 3 The application by Stonewater for the claims to be tried together is opposed by BAM. That application is not opposed by RPS who remains neutral.
- 4 The application by RPS for a preliminary issue is opposed by Stonewater.

Background

- 5 The history of the proceedings can be summarised as follows. The residential blocks were constructed between 2004 and 2005. BAM and RPS entered into their respective warranties in 2007.
- 6 From about 2015 onwards, Stonewater carried out investigations into defects that had emerged in relation to the fire protection and other details of the construction.
- 7 In 2017, Stonewater entered into standstill agreements with BAM and with RPS. On 5 January 2018, BAM gave notice under its standstill agreement, namely that it wished to bring that agreement to an end.
- 8 As a result, on 2 February 2018, Stonewater issued its claim against BAM. In those proceedings, there was an initial stay so that the parties could comply with the pre-action protocol. Thereafter, on 28 February 2019, the particulars of claim were issued. On 31 May 2019, the defence was served. Both pleadings have been amended. On 26 November 2019, there was an amended particulars of claim and on 17 December 2019, there was an amended defence.
- 9 The matter came before the court on 5 September 2019 in front of Pepperall J. At that hearing, Pepperall J was invited to make an order that the claim against BAM should be case managed together with proceedings that had not then been issued against RPS. The judge rejected the request for the cases to be case managed together on the grounds that firstly, the proceedings were at different stages of progress; pleadings were closed at that stage in the BAM proceedings whereas the RPS proceedings had not then started; and secondly, because of the elderly nature of the BAM proceedings having been issued in 2018 concerning a construction that was completed in 2005.

- 10 On 16 November 2019, Stonewater issued its claim form against RPS. On 10 March 2020, particulars of claim were served in those proceedings. On 19 May 2020, the defence was served. On 7 July 2020, the reply was served.
- 11 In the meantime, the BAM proceedings were carried out in accordance with the timetable set by Pepperall J subject to minor extensions by consent. Disclosure took place in February 2020, witness statements were served on 30 April 2020 and expert reports were served on 3 July 2020.
- 12 The trial in the BAM proceedings has been listed for 16 November 2020 with a time estimate of ten days, including two days of judicial reading. Subject to the current application, it would appear that both parties would be ready for the November trial in the BAM proceedings.
- 13 In May 2020, Stonewater's solicitors requested BAM to agree that the BAM proceedings should be tried at the same time as the RPS proceedings. That request was refused by BAM by return letter and has led to the current contested application before the court.

Application for claims to be tried together

- 14 It is common ground that the court has the power under its case management powers set out in CPR 3.1 to order the trial of two or more claims at the same time and also, if necessary, to order an adjournment of the trial currently fixed for hearing in November.
- 15 In making a decision on this application, it is common ground that the court must bear in mind and have regard to the overriding objectives set out in CPR 1.1, including the fact that the court must make case management decisions that will enable the court to deal with the cases before it justly and at proportionate cost and further, that the court must ensure that cases are dealt with both expeditiously and fairly.

- 16 Mr Baatz QC, leading counsel for Stonewater, has also reminded the court of the provision of section 49(2) of the Senior Courts Act 1981 which includes a provision that in exercising its jurisdiction in every cause or matter before it, the court should secure that, as far as possible, all matters in dispute between the parties are completely and finally determined and all multiplicity of legal proceedings with respect to any of those matters is avoided.
- 17 Therefore, in approaching the application that is before the court regarding the potential trying of these claims together, the court has to exercise its judicial discretion taking into account the overriding objective, the matters raised by section 49, and carrying out a balancing exercise of all of the factors that arise in this case as a result of any decision that the court might take today.
- 18 The first matter to consider is the nature of the claims against each of the defendants in the two claims to consider whether or not there is a significant overlap in the claims and the issues that arise. Stonewater's case generally is that the external wall insulation render system provides little resistance to fire. Essentially, it is said that there is a gap in the cavity barrier and in the fire walls that effectively enables the expanded polystyrene core to form a route for any fire to travel through. As a result, there is created an unacceptable and immediate risk to safety of the residence of the buildings through fire. It is said that there are inadequate fire breaks, inadequate compartmentation, inadequate fire stopping measures, inadequate smoke exhaust riser, and other defects that affect the safety of the residents in the building. It is also said by Stonewater that there are a number of additional defects including water ingress into the buildings. The damages claimed are based on the cost of carrying out the remedial works and decanting the residents during the course of those remedial works which is said to give rise to a claim for damages for about £6 million.
- 19 The claim against BAM is that it failed to supply or construct adequate materials and details so as to comply with building regulations and/or other employers' requirements. The claim

against RPS is that it failed to specify adequate materials and details so that it, likewise, was in breach of the relevant building regulations and the relevant provisions within the consultancy agreement. In both cases, it is said that those breaches give rise to liability under the warranties. For completeness, there is also a claim under the Defective Premises Act 1972. Both defendants raise issues of limitation.

20 The defendants' positions in each of their defences also raise the potential for blame to be cast on each other. In BAM's pleaded defence, it pleads that if the inadequate details were matters of design then it is something for which it has no responsibility. In RPS's defence, it pleads that if the inadequacies in the construction were effectively workmanship, then it is a matter for which it has no responsibility. Further, in the RPS defence, it pleads that if it is liable for any of the defects, the predominant moral and causative responsibility for the defects is still BAM, a matter that could affect the degree of liability for which RPS would contend it should be held responsible.

21 It is clear from a perusal of the pleadings and the brief passages in the experts' reports to which I have been taken that the two separate claims largely allege the same defects against each of BAM and RPS and they claim the same damages, to all intents and purposes, against BAM and RPS. To that extent, there is a very large degree of overlap in the claims against the two defendants.

22 The starting point therefore is that in order to avoid a multiplicity of proceedings and the risk of inconsistent findings, those claims should be heard together in the same trial in some shape or form. However, that is simply the starting point for the court. The other balancing factors are not as straightforward.

23 The second factor that I consider is the disparity in the parties' readiness for trial. The BAM case, as I have already indicated, is ready for trial in November. Pleadings are closed, there

has been disclosure, witness statements have been served, and the experts have produced joint statements and served their reports. Therefore, the BAM proceedings are in the very late stages of the final preparation for trial. In contrast, the RPS proceedings are in the foothills of preparation for trial. The parties have this morning agreed the directions that they would invite the court to make starting with costs budgets, a case management conference, and following with disclosure witness statements and experts' report leading to a trial that could be listed next June, that is 2021. It follows that if the court were to accede to Stonewater's application, that would involve an adjournment of the BAM trial.

24 Thirdly, I consider whether Stonewater has provided an adequate explanation for the delay in progressing the RPS claim that would justify this late application for adjournment of the BAM trial. The explanation that has been provided by Mr Lancaster in his third witness statement certainly sets out the recent difficulties that Stonewater's current legal team have faced. There was a change of experts towards the end of 2019 which explains the time that it took for Stonewater to produce its particulars of claim against RPS, that is, having commenced proceedings in November 2019, the particulars of claim were not produced until 10 March 2020. However, there is no real explanation before the court for the delay in pursuing RPS from the time that the proceedings were started against BAM in 2018. It would have made sense for the pre-action protocol to have been conducted with both potential defendants at the same time. The particulars of claim against BAM were served in February 2019. There is no explanation for the failure to commence proceedings and plead a case against RPS at that time. As a result, there is no satisfactory explanation before the court as to the lateness of this application that if made in 2018 would no doubt have been acceded to by the court with very little concern.

25 The fourth point that the court has to consider is the issue of justice to the parties. Mr Baatz has raised the potential of inconsistent findings being made against BAM and RPS if these

matters were to proceed by way of separate trials. Mr Rowlands QC, leading counsel for BAM, accepts that as a matter of principle, there is a risk of some inconsistent findings. However, he submits that this is not a case in which there are significant issues of fact for the court to determine. Further, insofar as the court has to decide the issue of defects, those will primarily turn on matters of expert evidence, and questions of construction and law. To that extent, the risk of inconsistent findings is perhaps lower than it would otherwise be in a case where there were very hotly contested facts that turned on the credibility of witnesses some of whom might be called in one set of proceedings and others in the subsequent set of proceedings. So, on that point, I accept that there is a risk of inconsistent findings but it is not a significant risk given that the experts who are likely to be providing their evidence in both trials, at least as far as Stonewater is concerned, are unlikely to present different cases in each set of proceedings.

26 Fifthly, I come to the question of overall fairness. The issue is whether it is unfair on BAM, who does not want its trial in November to be delayed, to force BAM to have to abandon that trial and deal with a trial in which there are two defendants in which there will be the need for further disclosure, further experts' reports, further experts' meetings, and then a longer trial in the summer of next year. Such a measure would increase the costs for all parties because there will be a longer trial and during the delay, additional steps will have to be taken which will no doubt increase the costs of all parties.

27 There is then the general prejudice that will be suffered by BAM through prolongation of the litigation. In this case, that is no minor issue. The construction was completed in 2005. The warranties in question were entered into in 2007. The claim against BAM was started at the beginning of 2018. Against that background, this already stale claim should be pursued against BAM as soon as reasonably practicable and it is simply not fair to have these proceedings hanging over BAM's head for longer than is reasonably necessary.

28 I also have regard to the decision of Pepperall J back at the CMC in September 2019, although this is not a determinative factor. If there were going to be joint case management and a joinder of the trials in these cases, that was the time at which that decision could and should have been taken. The decision was taken at that point by Pepperall J based on the state of affairs then existing. There was no appeal against that decision. I repeat that is not determinative of my decision in this case. It does not preclude Stonewater raising this matter again but it does serve to emphasise the very late timing of the application.

29 It is ultimately on the late timing that the court has decided that the application should be refused. It is simply too late now to ask BAM to abandon the trial for which it is ready and for which it has been preparing for two years simply so that the proceedings may be more convenient. For those reasons, the application by Stonewater for the two claims to be tried together is refused.

Application for preliminary issue

30 I now turn on to the application by RPS which is that in the 414 claim, there should be a preliminary issue, namely:

“On a true construction of the warranty, did RPS warrant that the works would meet the requirements of building regulations consents and all other relevant statutory requirements, which included the building regulations themselves and the approved documents being an absolute warranty as alleged in paragraph 8(c) of the particulars of claim and paragraph 15 of the reply, or did RPS merely warrant that it would use reasonable skill and care as alleged in paragraph 15(2) of the defence?”

31 Mr Patten QC, leading counsel for RPS, submits that this issue is one that could be dealt with in a discrete hearing before the court lasting for about two hours and that that would

dispose of a significant issue in the case. Mr Patten's submission is that on the current pleadings, the issue raises, first of all, an issue of construction of the warranty itself; secondly, a point of law, namely whether any attempt to impose an absolute warranty on RPS would require very clear words; thirdly, whether RPS could be said to have assumed any greater obligation than it would have had to ASDA, the original developer and party to the consultancy agreement with the architect.

32 There is a dispute as between Mr Patten and Mr Baatz as to whether, and if so how much, factual evidence might be required in order to determine the issue. Mr Baatz submits that the warranty refers in terms to the consultancy agreement and therefore, it would be necessary for the court to have regard to the consultancy agreement terms and that would include looking at the factual matrix giving rise to the consultancy agreement. Regardless of whether that submission is correct or not, the fact is that any factual matrix evidence is likely to be reasonably confined and therefore even if this matter could not be dealt with within two hours, I am reasonably confident that it could be dealt with in a short one-day hearing.

33 However, Mr Baatz has a more formidable opposition to the application and that is that the preliminary issue would not be dispositive either of the claim as a whole against RPS or of a significant issue in the case against RPS.

34 The first question that the court must always ask itself in these applications is whether the determination of the preliminary issue would dispose of the case or at least one aspect of the case. In this case, the answer is 'no'. Clearly, the preliminary issue would determine whether or not RPS gave an absolute warranty under the terms of the warranty in respect of the architectural aspects of the development but as Mr Baatz has pointed out in his skeleton and in his submissions, that would still leave virtually all of the claim against RPS simply made on the basis of reasonable skill and care. It is common ground that almost all of the

defects would still remain part of the claim. There would be no significant change to the quantum of the claim. There would be no real saving in terms of costs or time at the trial and, of course, any saving in costs at the trial would be outweighed by the costs of trying the issue separately.

35 More significantly, putting into the timetable a preliminary issue would have an impact on the timetable in the proceedings against RPS. The court would have to find a day's hearing between now and next June. No doubt that could be done but it is unlikely that the parties would be able to proceed with the timetable without any interruption. There is also then the prospect of an appeal regardless of which way the court were to determine the preliminary issue. If it is as significant as the parties consider it to be, potentially raising the spectre of some form of test case, then it is likely that it would be appealed. That would have a significant impact on the trial timetable.

36 Ultimately, I am not satisfied that there would be any substantial benefit from trying that particular issue before any of the other issues. It is of significance that if the court at the trial were to find against RPS or in favour of RPS on the reasonable skill and care allegations in respect of each defect, then this issue would not make any difference to the final outcome of the case.

37 It seems to me that for all of those reasons, the application should be refused and I do so.

CERTIFICATE

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