



Neutral Citation Number: [2021] EWHC 1027 (TCC)

Case No: HT-2018-000046

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

Before :

MRS JUSTICE JOANNA SMITH

Between :

Dana UK Axle Limited
- and -
Freudenberg FST GMBH

Claimant

Defendant

Mr Geraint Webb QC and Mr Harrison Denner (instructed by Crowell & Moring) for the
Claimant

Mr Luke Wygas (instructed by Fladgate LLP) for the Defendant)

Hearing dates:

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE JOANNA SMITH

Mrs Justice Joanna Smith :

Introduction

1. This is my judgment on an application made by the Defendant (“**Freudenberg**”) dated 9 April 2021 (“**the Application**”) to re-amend its Defence. The parties have agreed that my judgment should be prepared without a hearing.
2. The Application is made very close to trial, which is fixed to commence on 4 May 2021 with an 11 day time estimate. In support of the Application, Freudenberg relies upon information set out in the Application itself together with the third witness statement of Rudolf Bott dated 8 April 2021 (“**the Bott Statement**”).
3. The Bott Statement is said to concern matters arising out of the first witness statement of Alastair Wilkinson dated 6 January 2021 (“**the Wilkinson Statement**”), a statement provided to the Defendant in draft by the Claimant (“**Dana**”) in October 2020 and served (unchanged) on 4 February 2021. In particular it seeks to verify factual matters contained in paragraph 20A.3 of the proposed Re-Amended Defence. There is no separate application on the part of Freudenberg to rely on this witness statement and no application for relief from sanctions.
4. Dana opposes the Application and relies upon a witness statement of Nicola Phillips dated 15 April 2021 (“**the Phillips Statement**”) in support of its skeleton argument of the same date.
5. Freudenberg provided the court with a skeleton argument dated 16 April 2021 to which Dana responded in a supplemental skeleton argument served later that same day.
6. I am grateful to the parties for providing me with access to the trial bundle on the Opus platform. Where necessary, I have looked at documents in the trial bundle that have been identified by the parties in their skeleton arguments.

The Background to the Proposed Amendment

7. A key issue in this litigation concerns whether Dana’s standard terms and conditions have been incorporated into the contractual arrangements between the parties. From the outset of the litigation, Dana’s case has been that the governing contract was formed on the basis of Freudenberg’s acceptance of Dana’s written Purchase Order dated 17 July 2012 (“**the 2012 Purchase Order**”) and therefore that its terms and conditions were incorporated into the contract for the supply of pinion seals.
8. By its Defence dated 16 November 2018, Freudenberg denied that its acceptance of the 2012 Purchase Order was the basis of the contract between the parties, asserting that the 2012 Purchase Order was a post-contractual document and pleading that the relevant contract for the supply of pinion seals between 2013 and 2016 was formed following Dana’s acceptance (on 25 April 2003) of a formal quote provided by Freudenberg on 2 April 2003. This quote expressly referred to Freudenberg’s terms and conditions which it was therefore said had been incorporated into the contract between the parties.
9. No alternative position was pleaded by Freudenberg in relation to the 2012 Purchase Order; Freudenberg simply denied that a new contract had been formed in 2012.
10. In its Reply dated 31 January 2019, Dana contended that the orders for pinion seals placed in 2003 related to an entirely different program. The seals relevant to the litigation were supplied following the launch in 2012 of a new vehicle program for Jaguar Land Rover.

11. Witness statements were served in the proceedings in April 2020. One of Freudenberg's witnesses raised a new, unpleaded, allegation in his statement that the 2012 Purchase Order was sent to him by Dana and that he lacked authority to agree to it in any event. This led to a round of amended pleadings together with the service by Dana of supplementary evidence in response to the new allegation.
12. The Re-Amended Particulars of Claim pleaded that the 2012 Purchase Order was merely the first of a series of Purchase Orders ("**the Further Purchase Orders**"), as had already been pleaded in the Reply, and that the Further Purchase Orders had been sent to others within Freudenberg. The Amended Defence pleaded that the Further Purchase Orders were post-contractual documents and introduced the issue of authority in respect of the 2012 Purchase Order and the Further Purchase Orders.
13. The service of these amended pleadings and further supplementary evidence was formalised by a Consent Order dated 15 February 2021.
14. At the Pre-Trial Review on 19 March 2021, Mrs Justice O'Farrell gave directions to trial. There was a substantive issue as to new unpleaded issues being raised in Freudenberg's expert evidence. Freudenberg was ordered to serve a revised expert report striking out the new unpleaded issues. I understand that at this stage, Freudenberg did not suggest the possibility that it might wish to make further amendments to its Defence.
15. The amendment that is now proposed by Freudenberg involves a new alternative pleading (at paragraph 20 and 20A.1-20A.4) that is premised on the acceptance of the possibility that the court might find (in accordance with Dana's case) that a new contract was formed in 2012. Essentially, Freudenberg now pleads that if there was a new contract formed in 2012 (or subsequently), "it is denied that Dana's Terms and Conditions were incorporated into that contract or those contracts. Instead on the basis of the correspondence relied on by Dana, the contract or contracts incorporated Freudenberg's Terms and Conditions" [20A.2].
16. The correspondence referred to is in the form of delivery notes and invoices, the latter of which make reference to Freudenberg's terms and conditions and which Freudenberg pleads are relied upon in paragraphs 22 and 28 of the Wilkinson Statement. As to the documents referred to in paragraph 22, these invoices and delivery notes pre-date the 2012 Purchase Order and Freudenberg pleads that they refer to a purchase order dated 11 September 2011 ("**the 2011 Purchase Order**"). As to the invoice referred to in paragraph 28, Freudenberg pleads that this post-dates a 27 June 2013 Purchase Order on which Dana relies by way of its amendment. In 20A.3, Freudenberg denies that fulfilment of the 2012 Purchase Order or the 27 June 2013 Purchase Order "impacts on incorporation of Freudenberg's terms and conditions into any contracts Dana proves were based on" those Purchase Orders. Freudenberg goes on to plead that invoices were produced on the day of dispatch of the relevant seals, put in the post via a method that took 5 working days and so were delivered to Dana prior to delivery of any seal. Accordingly, it is said that Freudenberg's terms and conditions as set out in the invoices would apply to the 2012 Purchase order, the 27 June 2013 Purchase Order or any other purchase order.
17. This new "battle of the forms" argument is entirely unheralded, but represents, as Freudenberg accepts in its Application, a "secondary positive case".

The Legal Principles

18. The legal principles on an application to amend pleadings are well known and are not in dispute. Both parties refer to *Quah Su-Ling v Goldman Sachs Limited* [2015] EWHC 759 (Comm) per Carr J (as she then was) at [36]-[38]. I do not set these paragraphs out in this judgment but take them as read and have regard to them in deciding the Application.
19. I now turn to look at each of the elements identified in *Quah Su-Ling* in the context of this Application.

Principles Applied

General Considerations:

20. This proposed amendment arises late in the day, as Freudenberg accepts. It is said to arise by reason of the way in which Dana now puts its case in the Wilkinson Statement. Indeed it is asserted that it was only after receipt of this statement that Freudenberg knew the conduct Dana relied on in relation to the acceptance of the 2012 Purchase Order and Further Purchase Orders. In the Application Freudenberg says that the amendment could not be made until a review had been carried out of Dana's most recent evidence, i.e. the Wilkinson Statement. Freudenberg says that this review "would have been carried out prior to the PTR but the Defendant was engaged in defending an application brought by the Claimant trying to exclude the Defendant's expert evidence". It goes on to say that "Since the PTR on 19 March 2021, [it] has started its preparations for trial. This has included considering the evidence served by the Claimant on 4 February 2021".
21. As for the Bott Statement, Freudenberg says that this is very short, running to only 7 paragraphs and that it "deals with the matters the Claimant now seeks to rely on as to the Defendant's alleged conduct". Freudenberg provides no explanation as to why it has not sought to make an application for permission to rely on the Bott Statement.
22. The Bott Statement is indeed short. It seeks to verify the details as to the production and sending of invoices set out in paragraph 20A.3 of the proposed Re-Amended Defence by (i) confirming that the facts are correct; and (ii) stating that "in order to verify the fact that the Defendant's invoices were sent out by post I have also spoken to the Defendant's finance department and post room who have confirmed to me that this is factually correct". Mr Bott does not identify the individual(s) to whom he spoke or their role at Freudenberg. In my judgment this hearsay evidence does not begin to demonstrate, or purport to demonstrate, when the invoices were posted or whether they would have been delivered via the German and English postal services by the time that the seals were delivered.
23. The question for me is whether, in all the circumstances, I should permit Freudenberg to make a late amendment to pursue a new positive case in circumstances where it asserts that this is purely a response to evidence clarifying the nature of Dana's case that it has only seen relatively recently.

Real Prospect of Success

24. In my judgment, the proposed amendments have no real prospect of success for the following reasons:
 - a. I agree with Dana that the proposed pleading mischaracterises Mr Wilkinson's evidence at paragraphs 22 and 28 of his statement and appears to proceed on the basis that this evidence has somehow changed Dana's pleaded case such that it is now confined to reliance upon the invoices and delivery notes to which he

refers in those paragraphs. Indeed Freudenberg's skeleton argument asserts that Dana's case is now "based on receipt" of the 17 July 2012 invoice, which predated the 2012 Purchase Order. The Wilkinson Statement does not have this effect. On the contrary, Dana's case on incorporation of terms is and has always been set out in its pleadings (see e.g. paragraphs 4, 5 and 11 of its Re-Amended Particulars of Claim, paragraph 5.2 and 13.2 of the Amended Reply).

- b. As Dana correctly says, the relevant test as to whether the parties reached an agreement is an objective test. This is not a question of the subjective intentions or understandings of the individuals concerned. Insofar as the evidence in paragraphs 22 and 28 of the Wilkinson Statement is subjective evidence in that he expresses his own views, those views are inadmissible to the question of contract formation and incorporation of terms.
 - c. Insofar as the proposed amendments appear to rely on a purchase order dated 11 September 2011, I understand from the Phillips Statement that it has not been disclosed in these proceedings and that Dana has no record of it. Indeed Mr Bott's evidence in his first witness statement appears to be to the effect that there was no purchase order issued on this date (see paragraphs 44-46). The Bott Statement does not make reference to this issue and the proposed amendments are silent as to its significance.
 - d. Insofar as the proposed amendments seek to rely on a post-dated invoice referred to in paragraph 28 of the Wilkinson Statement (see paragraph 20A.1(4)), there is no attempt adequately to explain how or why the terms and conditions contained in an invoice sent long after the relevant purchase order should in fact govern the terms of the contract between the parties.
 - e. To the extent that the new case that the contract incorporated Freudenberg's terms and conditions is premised upon "the correspondence relied on by Dana" (as it appears to be), that premise is misconceived.
 - f. Further, the new case addresses Dana's case on fulfilment. As pleaded it requires Freudenberg to prove that the invoices on which it now wishes to rely (because they set out the Freudenberg terms and conditions) were provided to Dana before delivery of any seals. The only available evidence to support this proposition is contained in the Bott Statement and is wholly inadequate for this purpose for reasons already identified above (aside from the fact that Freudenberg has not sought to ask the court for permission to rely on this statement, an omission which is not even acknowledged, let alone addressed in Freudenberg's skeleton argument).
25. Accordingly, I dismiss the Application on this ground alone, and refuse permission for the Bott Statement. If, however, I am wrong on the question of no real prospect of success, I should make it clear that I would have dismissed the Application in any event on the following grounds.

Reasons for Lateness and Delay

26. The only explanation for the delay in advancing this amendment appears in the Application and is set out in paragraph 20 above. In my judgment this is unsatisfactory, particularly given that "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" (*Quah Su-Ling* at [38(f)]). I note in particular that:

- a. The Application does not mention that the Wilkinson Statement was served in draft on 26 October 2020, more than 6 months prior to the Application. It does not identify whether a review was carried out of the Wilkinson Statement at that stage and what, if any, conclusions were arrived at. It does not explain why Freudenberg has not put its mind to the issues identified in the proposed amendments upon receipt of the Wilkinson Statement, particularly given that Freudenberg consented to Dana's request to rely upon that statement (as evidenced by the Consent Order of 15 February 2021) and further amended its Defence in the knowledge of Mr Wilkinson's evidence prior to the PTR. Freudenberg's skeleton argument also fails satisfactorily to address this issue, saying only that "until the evidence was served in final form [Freudenberg] did not know it would remain the same". To my mind, this does not begin to provide an adequate explanation for this late application.
- b. The Application seeks to tie the proposed amendments to the substance of Mr Wilkinson's Statement. However, the proposed amendments in fact involve reliance upon an entirely new alternative case which is based upon Freudenberg's own documents. There is no reason why this case could not have been advanced before now and Freudenberg does not suggest any such reason. The invoices relied upon by Freudenberg in the proposed amendment were generated long before the commencement of these proceedings, have been disclosed in the litigation and many of them were referred to in Freudenberg's witness evidence. There is no explanation as to why Freudenberg has never previously considered the question of whether it would have a defence if Dana's case on contract formation in 2012 were to be accepted at trial.
- c. Dana's case on incorporation of its terms and conditions as pleaded in its Particulars of Claim has remained the same since the outset of the litigation. By its pleadings, Dana relies upon the relevant circumstances pertaining to Freudenberg's conduct as evidencing its acceptance of the offer to contract contained in the 2012 Purchase Order and its fulfilment of that 2012 Purchase Order. The Wilkinson Statement at paragraph 22 is concerned with the issue of authority, not with seeking to advance some new case as to contractual acceptance (which in any event would need to be pleaded if it was to be pursued). Given that Dana does not seek to rely on the documents identified by Mr Wilkinson, it is not correct to say that the amended pleading has been necessitated by his witness statement. In the circumstances it is difficult not to regard this attempt to plead an alternative case as a change of strategy identified by Freudenberg at the last minute in advance of trial, rather than a genuinely new case prompted purely by some late evidence from Dana.
- d. It is, at best, extremely difficult to understand why these proposed amendments were not identified in advance of the PTR. The Wilkinson Statement was served on 4 February 2021, i.e. some six weeks in advance of the PTR at which all the issues for trial should have been identified. Even assuming that Freudenberg was entitled to sit on its hands pending receipt of the final version of the Wilkinson Statement (which in my judgment it was not), I do not consider that the fact that Freudenberg was engaged in fighting an application to strike out parts of its expert evidence (which application succeeded) justifies a complete failure to give proper and detailed consideration to the issues that would arise at trial in advance of the PTR. Once Freudenberg had received the Wilkinson Statement in draft and consented to it (and assuming for these purposes that it

included new evidence likely to prompt an alternative pleading), Freudenberg should have considered as a matter of urgency the likely impact that the evidence given by Mr Wilkinson would have on its case. There is no proper explanation as to why this did not occur.

- e. Insofar as the amendments are reliant upon the Bott Statement, there is no explanation as to why that statement is provided so late, why no application has been issued seeking permission (and relief from sanctions) in relation to that statement and why Freudenberg has not obtained evidence from the unidentified individuals in the post room who have been consulted by Mr Bott.
27. In summary, there has been no proper explanation of the reasons for the delay in advancing these proposed amendments together with the Bott Statement, nor has any good reason for the delay been identified.

Prejudice

28. The Phillips Statement details the prejudice that Dana would suffer if the Application were to be granted.
29. In particular:
- a. The diversion of its attentions from trial preparation in the immediate run up to trial (opening skeletons are due to be served this week);
 - b. The need to make consequential amendments;
 - c. The need to engage in a new factual investigation. In particular, at paragraph 46 it is said that where the proposed amendments rely on a new analysis of the steps taken by the parties between a purchase order and the dispatch of seals, it would now be necessary to consider new material which has not been relevant to this litigation to date, including Dana's provision of material release schedules to Freudenberg and Freudenberg's provision of "Advanced Shipping Notices". As to the latter, it is said that Freudenberg would now also need to engage in a further search for, and disclosure of, documents and that these would have to be considered by Dana as part of its further analysis of the parties' conduct;
 - d. The preparation of supplemental witness statements;
 - e. Consideration by the parties' German law experts of the new factual matrix.
30. Given the nature of the proposed amendment and in particular its focus on new aspects of the relationship and dealings between the parties as being relevant to the incorporation of terms and conditions, I accept that further work is likely to be required (of the sort identified in the Phillips Statement) and that this would cause prejudice to Dana, including serious disruption to its trial preparations. I accept that there is almost certainly insufficient time prior to the trial to make any meaningful progress with these tasks and that there might well be jeopardy to the trial date if the amendments were to be permitted.
31. Of course, refusal to grant permission for the amendments will cause prejudice to Freudenberg in that it will not be in a position to advance this new alternative case at trial (assuming for these purposes that it has a real prospect of success), however in my judgment that prejudice is far outweighed by the prejudice that would be suffered by Dana.

Striking the Balance

32. Given my finding that this proposed amendment has no real prospect of success, I need not strictly address the discretionary balancing exercise or the overriding objective. However, as I have said, even if the proposed amendments were arguable, I would still have dismissed the Application on the grounds that it is too late, that there is no adequate explanation for the delay and that the balance of prejudice to Dana outweighs the prejudice to Freudenberg. In particular, the prejudice to Freudenberg of losing the opportunity to raise a new case is not sufficient to overcome the prejudice to Dana as set out above in circumstances where no proper explanation has been provided by Freudenberg for the delay and where it is difficult not to conclude that the failure to plead this amendment earlier is the result of Freudenberg's own decision not to investigate all possible avenues of defence at an earlier time. The fact that permission to rely on the proposed amendments might result in the loss of the trial date is another significant consideration.

Conclusion:

33. For the reasons set out above, I dismiss the Application to amend and, for the sake of completeness, I also refuse permission to Freudenberg to rely on the Bott Statement.
34. I invite the parties to agree on the terms of an order and all consequential matters.