Neutral Citation No.: [2023] EWHC 311 (TCC)

Case No: HT-2021-BHM-000013

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
(BIRMINGHAM)
KING'S BENCH DIVISION

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham
B4 6DS

Friday, 20 January 2023

BEFORE:

HIS HONOUR JUDGE RICHARD WILLIAMS

BETWEEN:

(1) MICHAEL SARKESIAN
(2) OKSANA MUL

Claimants

- and -

HUTTON CONSTRUCTION LIMITED

Defendant

MR J FAIRBAIRN (instructed by Dentons) appeared on behalf of the Claimants
MR T OWEN (instructed by Watson, Farley & Williams LLP) appeared on behalf of the Defendant

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JUDGMENT

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(Official Shorthand Writers to the Court)

JUDGE WILLIAMS:

Introduction

1. This is my judgment following the hearing of the claimants' application for permission:

    a. to amend the Particulars of Claim; and

    b. to rely upon the expert report of Mr Taylor, senior timber frame consultant, whose report is dated 11 November 2022

and in the context of a claim for damages for breach of a JCT contract.

Background

2. By way of brief background, the first claimant is Mr Sarkesian, and the second claimant is Mrs Mul. Until recently they were husband and wife, who together with their children occupied Fairhill, Riding Lane ("***the property***") as their family home.

3. The property was purchased in 2006 in the name of the second claimant before being transferred into the name of the first claimant in 2016. It is a substantial property comprising a listed country house and 70 acres of grounds.

4. In April 2008, the second claimant appointed the defendant, Hutton Construction Limited, as main contractor to carry out extensive refurbishment, extension and alteration works to the property. The initial contract sum was for some £3 million.

5. Earlier court proceedings were issued in which the claimants claimed damages of some £1 million in respect of alleged defective works. Those proceedings were compromised in 2014, although the settlement agreement excluded any latent defects, being defined as any defect unknown and not reasonably discoverable at the date of the agreement, but subject to a de minimis limit of £100,000 plus VAT for remedial costs.

6. In April 2021, the claimants issued the present proceedings. It is alleged that, in or around March 2020, the claimants discovered an ingress of water through a flat lead

roof installed by the defendant. The claimants sought damages of some £385,000, the bulk of which relate to the cost of remedial works to the roof.

7. Following a costs and case management hearing on 9 February 2022, directions were given to trial. The trial was listed to be heard on 27 February 2023 with a time estimate of four days with extended disclosure by 13 May 2022 and exchange of factual witness statements by 10 June 2022. Those directions have been complied with.

8. The parties were also each given permission to rely upon separate experts for both liability and quantum, the claimants' liability expert being Mr Lindley and the defendant's liability expert being Mr Hay. It was directed that they were to hold discussions by 15 July 2022, serve statements by 5 August 2022 and prepare a joint statement addressing issues of disagreement by 2 September 2022. Those directions have not been complied with.

9. The budgeted costs were: for the claimants some £330,000 and for the defendant some £400,000.

10. The electronic bundle for this hearing extends to 641 pages and I am unable, in the course of this judgment, to refer to all the evidence and argument relied upon by the parties, but I have taken it all into account.

The proposed amendments/expert evidence

11. The most contentious proposed amendments are new paragraph 27(e) under the subheading "**The premature failure of the flat lead roof and the ingress of water**." New paragraph 27(e) states that:

> "Notwithstanding the condensation and/or other ingress of water the plywood would not have delaminated and lost its integrity resulting in the premature failure of the lead flat roof had all the plywood supplied and fitted been in accordance with the Specification."

12. Further, the proposed amendment at paragraph 32 under the subheading "Particulars of Loss" states:

> "….. and in the alternative, the claimants claim the cost of replacing the plywood. These are estimated to be £185,000 plus VAT….."

13. The report of Mr Taylor records that he was provided with two packages of plywood for testing. Each package contained a small sample of the plywood deck which had not failed in service, along with a handful of loose veneers taken from the plywood which had failed. He was only able to test forensically the plywood which had not failed in service as plywood glue bond testing cannot be conducted on already failed/ delaminated plywood. In addition, he was provided with a number of short video clips of opening up works showing the condition of the plywood deck and roof structure. Mr Taylor reported that the glue bonding testing results were consistent with the samples of plywood which did not fail in service, likely coming from a batch of plywood being in accordance with the Specification.

14. Mr Taylor also carried out a visual examination of the gross characteristics of the plywood which failed in service along with the plywood which did not. He observed a number of differences based upon those visual observations of the plywood veneers and a review of the video clips. He concluded that the plywood which failed in service was of substandard quality.

Analysis and conclusion

15. Ultimately, whether to allow an amendment and/or expert evidence are case management decisions in the discretion of the court with such discretion being exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost.

Trial date lost?

16. If I were to grant permission for the claimants to rely upon the evidence of Mr Taylor, then it must follow, in the interests of fairness and to ensure that the parties are on an

equal footing, that the defendant also be given permission to rely upon its own timber frame expert and, indeed, in written submissions it was confirmed that the claimants do not object to the defendant obtaining its own expert evidence.

17. The trial is due to start five weeks on Monday. The parties will need to agree the trial bundle to be filed at court at least seven days before the start of the trial and to allow counsel sufficient time to prepare and file their skeleton arguments in sufficient time for the trial judge's prereading. In practical reality, there are only four weeks available for the defendant to obtain and serve its expert report and then for the experts to discuss and prepare a joint statement setting out their areas of agreement and disagreement with reasons for any disagreement. In my judgment, there is now simply not the time available for all that to be done before trial, and so it is inevitable that, if permission for further expert evidence is granted, then the trial date will have to be vacated.

18. Can the proposed amendments be divorced from the need for further expert evidence such that those amendments be permitted and the trial date preserved? The claimants say yes, and the defendant says no.

19. It is submitted on behalf of the defendant that:

    a. the proceedings to date have focused on the assertion that the lead roof did not contain ventilation, that this caused condensation, moisture and ingress in the roof and this caused the roof to fail. It is asserted that the defendant was responsible for the lack of ventilation notwithstanding that it did not design the roof and that the roof failed by reason of the lack of ventilation;

    b. now the claimants seek to introduce a new case, namely that the plywood in the roof was not of sufficient quality, that the ventilation assertion was not causative and that the roof would have failed by reason of the plywood not the lack of ventilation. This is a new cause of action after expiry of the limitation period;

    c. the change of focus, even in the absence of further expert evidence, would still require not only amended statements of case but further extended disclosure

and new factual evidence addressing the issue of whether or not the supplied plywood was substandard.

20. It is submitted on behalf of the claimants that:

a. this is not a new claim; it was always part of the claim even if this was not appreciated by the defendant. Mr Hay sought invoices for the plywood to attach to his report and the defendant's lay witnesses are at pains to point out that WBP plywood was purchased thereby evidencing a concern that the plywood might not be the required grade;

b. in his witness statement, Mr Doughty describes under the heading "Trial issues- material" the plywood purchases.";

c. Mr David Lewis devotes five paragraphs of his statement to the quality of the plywood and attaches copies of the relevant invoices to his witness statement;

d. the defendant's notice to admit, sent on 31 March 2022, sought an admission based on 12 invoices that the plywood was to the correct WBP grade;

e. whether the roof would have survived notwithstanding the absence of ventilation is irrelevant. The employer is entitled to have materials supplied to the quality stated in the contract specification. If, in theory, goods are supplied, the employer is entitled to rectify the deficiency and claim the costs from the contractor.

21. In my judgment, and for the following reasons, the proposed amendments do amount to a radical change of focus in this case which, if permitted, would necessarily require not only amended statements of case but also further extended disclosure and also further factual witness statements.

22. In his initial report dated November 2020, Mr Lindley stated that the comprehensive nature of the workmanship and installation failures, most particularly the failure to ventilate the void beneath the lead sheet roof, consequentially causing wholesale delamination of the plywood, means that no remedial measures were possible. In his

initial report, Mr Hay agreed with Mr Lindley that the roof was defective and required replacing because the void was unventilated. However, it was his opinion that the defect was not a workmanship issue but one of design. Therefore there was a substantial measure of agreement between the experts.

23. Unsurprisingly, the Particulars of Claim expressly focus upon the cause of the roof failing being the lack of ventilation, specifically at sub-paragraphs 27(c) and (d) and paragraph 29.

24. The CCMC order provided for extended disclosure in accordance with the annexed disclosure review document which runs to six pages. In relation to the alleged defects, the claimants sought Model B and the defendant sought Model D disclosure. The court ordered Model D.

25. Paragraph 28 of the Particulars of Claim lists no fewer than 13 defects including that the plywood was not WBP standard.

26. Following the CCMC the claimants' solicitor sought to narrow the issues, and no doubt mindful in part of the costs being incurred in relation to what was considered to be an unnecessary and disproportionate disclosure exercise. In their letter dated 12 April 2022, the claimants' solicitors wrote in the following terms to the defendant:

> "……..
>
> With regards to the valuation exercises…..The fundamental problem as accepted by both parties' experts, is the roof is defective and failed due to lack of ventilation. The remedial costs are the costs of the entire replacement exercise, so for example there is no point in addressing the clips and flashings issue in isolation. Our client has not made a claim for that cost in isolation. Obviously, the clips and flashings had to be replaced as part of the wider exercise of stripping the defective roof and relaying it. You are embarking on this salami slice approach to the valuation to support your argument that there is not a single defect but a series of defects each below the relevant value threshold. That is an artificial and self-serving approach and whilst we are agreeing to your proposed valuation exercise to avoid an argument over the scope of the expert instruction, this should not be taken as a tacit

> concession that we agree the approach is appropriate or that there is any merit in it.
>
> ……."

27. I note that as originally pleaded, in the same way that there was no specific claim for the cost of the clips and flashings, neither was there a specific claim in relation to the costs of replacing the plywood in isolation.

28. Further, on 20 July 2022, the claimants' solicitors wrote to the defendant's solicitors in the following terms:

> "…….
>
> We remain concerned that the parties are potentially spending large amounts of money on what we believe to be an entirely unnecessary task. It seems to be common ground that the problem here was caused by lack of ventilation. The plywood substructure has failed. The only relevant issue is whether the cost of rectifying the position cost more than £100,000. Bearing in mind that scaffolding costs alone with VAT exceeded £85,000, it seems unlikely that the work could ever have been completed for less than £100,000."

29. It now seems to me that the claimants are seeking to move the goalposts by extending inquiries which, if permitted, would in my view necessarily involve further disclosure, and factual witness statements. There is an internal inconsistency in the claimants' position since, if the proposed amendments are not fundamental, then why seek them at all?

30. If the application is granted, whether in part or whole, I am satisfied that the trial date will be lost.

Exercise of discretion

31. The trial date has been known to the parties since the CCMC. The whole purpose of providing a trial date at such an early stage of the proceedings, and thereby dispensing with a trial window and the filing of listing questionnaires, was to enable the parties to have a date to work towards in terms of preparing for trial.

32. As a result of the trial date being lost, there would be delay and further costs incurred in the context of a claim worth no more than £400,000 and with combined budgeted costs already of almost of £750,000.

33. If the application is dismissed, the claimants will be deprived of the opportunity of pursuing, in particular, a new causation argument. However, there is no good reason why, in my judgment, if this was such a critical issue it could not have been raised much earlier and, indeed, prior to the CCMC. Mr Lindley was engaged by the claimants in relation to the earlier proceedings and prepared a report in relation to these proceedings in November 2020. Had this issue properly been raised prior to the CCMC then permission could have been sought, whether separately or by way of a single joint instruction, for expert evidence and that aspect budgeted for, and the court timetable made to accommodate such further expert evidence.

34. The claimants' solicitors say that the claimants only became aware in March 2022 that the samples in Mr Lindley's possession were capable of being tested. However, even then, they did not put the defendant on notice of their intention to do so and raise the possibility of a single joint expert being instructed and/or a variation made to the case management directions. Having initially sought, but failed, to obtain a report from an earlier expert, they only told the defendant about the existence of Mr Taylor's report in August 2022, but even then the report itself was not disclosed until November 2022.

35. Civil Procedure Rules r.1.3 requires the parties to assist the court to further the overriding objective. That obligation necessarily involves a high level of realism and co-operation between the parties in their pre-trial management of the case. The application is made very late without, in my view, any or any good reason for the lateness of that application.

36. In conclusion, therefore, the application is dismissed. It would be wholly contrary to the overriding objective to allow such an application at this late stage which, if granted either in whole or in part, would cause the trial date to be lost. That concludes my judgment.

Judgment on costs

37. In relation to the principle of costs the court has a wide discretion as to whether costs are payable by one party to another. If the court decides to make an order for costs the general rule is that the unsuccessful party pays the successful party's costs, but the court can make a different order. In deciding what if any order to make, the court will have regard to all the circumstances including the conduct of the parties both before as well as during the proceedings.

38. It is submitted on behalf of the defendant that it ought to be entitled to its costs of the application and following my dismissal of the application. I am satisfied that the defendant is the successful party, although it is submitted on behalf of the claimants that I ought to depart from the normal rule that costs follow the event because of alleged litigation misconduct on the part of the defendant and in particular an allegation that the defendant failed to engage in mediation.

39. I have been provided with a copy of a letter written by the claimants' solicitor in which he refers to a mediation meeting having taken place and to a settlement agreement having been made, in principle, but which was effectively then withdrawn as a result of the claimants being in possession of the report of Mr Taylor; the very report which was the subject of the application before the court today and which application was dismissed.

40. So I am not persuaded that there is any good reason to depart from the usual rule that the successful party receive its costs from the unsuccessful party, and therefore I make an order that the claimants pay the defendant's costs of the application.

(After further submissions)

41. The court has a wide discretion in relation to case management powers, and so I am not persuaded that necessarily the application was inevitably hopeless and without merit. I am not persuaded that the circumstances surrounding the application itself takes the case out of the norm in a way that justifies an order for indemnity costs. So therefore it will be costs on the standard basis.

(After further submissions)

42. In relation to the amount of the costs I am required to undertake a summary assessment. Having regard to the complexity of the case, the importance of the case and particularly the amount in dispute, I consider that the costs claimed overall are unreasonable and disproportionate. I note that the time claimed on documents is a total of 102 hours which, by my calculation applying a working day of seven chargeable hours equates to fourteen days, almost three working weeks. I note that time is charged for three fee earners attending this hearing.

43. That said, I am conscious of the fact that this matter, although listed for two and a half hours, has taken much of the day and indeed it is now 6.00 pm. The hearing bundle, as referred to in my substantive judgment, runs to a staggering 640 pages.

44. In my view, striking the right balance, I consider that a reasonable and proportionate figure in respect of costs is £50,000.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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