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IN THE HIGH COURT OF JUSTICE — No. HT-2018-000250
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURT OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT

[2018] EWHC 3363 (TCC)

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 7 December 2018

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

MEARS LTD — Claimant

- and -

(1) COSTPLAN SERVICES (SOUTH EAST) LTD
(2) PLYMOUTH (NOTTE STREET) LIMITED
(3) J.R. PICKSTOCK LIMITED — Defendants

MR S. DENNISON QC and MS C. SLOW (instructed by Mishcon de Reya) appeared on behalf of the Claimant.

MR S. HALE (instructed by Kennedys Law LLP) appeared on behalf of the First Defendant.

MR D. WOOLGAR (instructed by Silver Shemmings Ash) appeared on behalf of the Second Defendant.

MISS C. PACKMAN (instructed by Mills & Reeve LLP) appeared on behalf of the Third Defendant.

J U D G M E N T

MR JUSTICE WAKSMAN:

1 I have to deal with the question of costs, first of all, as between the claimant on the one hand and what I might describe as the substantive defendants, that is D2 and D3, on the other. It is correct to say that the injunction which gave rise to this expedited trial was ordered on the basis of the claimant's position - in which it sought to establish that a certificate of practical completion cannot at this stage be given - which would have the effect (because of the longstop date) of effectively releasing the claimant from its obligation to enter into the twenty-one year lease with D2. At one level it can be said that this was a relatively straightforward point of construction which was the subject of Declaration 4 to the effect that any breach would prevent practical completion. If that was the only matter in dispute the application would have led to an expedited trial earlier than it in fact did and for a shorter period than it did.

2 The reason why it did not so proceed was because although it essential block for the claimant to establish the breach, the second and third defendant took a root and branch objection to every aspect of the breach argument by which I mean: first of all, on their construction, the planning drawings were not the governing drawings anyway; even if they were, the agreement should have been rectified; even if it should not, there was an implied term or the true construction was such, that in effect the planning drawings would be jettisoned; and even if none of that was right, there was an estoppel by convention; and, in any event, there was not even in relation to the rooms which were ultimately complained of a clear admission that they would otherwise be in breach; the latter is why there was an admittedly short part of my judgment dealing with some very residual arguments as to why the rooms size was in breach, even if all the other arguments had failed.

3 In those circumstances, while it is perfectly true that the claimant has not succeeded in its underlying or its overarching aim, which has been to prevent practical completion, this is to my mind clearly not one of those cases where the costs order should be driven simply by the result and the fact that there may have been issues along the way or within the trial on which the claimant has succeeded should simply be swept aside. This is classically a case where the court needs to look in a little more detail at who won on particular issues, giving due account for the fact that on the ultimate issue the claimant nonetheless failed.

4 As a reality check, I looked at how much of my judgment dealt with the different declarations after a number of pages of introductory remarks. Declarations 1 to 4 took fourteen pages. Declaration 5, which in my judgment involved a very large measure of factual evidence (as to estoppel by convention, and various factual matters said to be relevant as matrix evidence on the question of construction and breach itself) and which was the one on which the claimant succeeded, took fourteen pages as well. So one could say, looking at my deliberations, about half the time was spent on the matter on which the claimant won and half the time spent on the matter that the defendants had won on.

5 The defendants need not have taken the position they did on all the matters leading up to breach. That was very much a matter for them. But in my judgment that is really where most of the factual evidence became involved and on those matters of fact, ultimately, they lost. It is perfectly true that the claimant's case on the number of rooms complained of changed but I do not think much turns on that. It does not seem to me to affect the fact that the rectification was probably always going to fail can be mitigated by the fact that its evidence was tied up to some extent with arguments on estoppel by convention and so on. The critical point for rectification, of course, is that it involved very much an examination or

would have done of the subjective intentions of both sides and the extent to which they were really mistaken and that seems to me to be a separate matter.

6 I have to take account in how I weigh all of this, of course, by reference to the fact that the injunction proceedings when they started were very much tied to the ultimate conclusion sought and I have decided that the injunction must go. So that weighs in the defendants' favour. Had I been simply looking at this from the point of view of the issues without giving any kind of weighting then I might have been disposed to say that it is a kind of half and half position but if you have Mears getting 50 per cent of its costs and the defendants getting 50 per cent of their costs that starts to move towards a no order for costs position. However, that seems to me not to do justice or give proper weight to the fact that the ultimate aim here has not resulted in success, that the driver for the injunctions was that ultimate argument and that that overarching point has to be taken into account. On that basis, I consider that the right order is that the claimant must pay 40 per cent of the third defendant's costs and 40 per cent of the second defendant's costs.

7 So far as the first defendant is concerned, the truth of the matter is that there was nothing on which the first defendant could meaningfully contribute bearing in mind the stance which it took, which is it said it was an essentially neutral party. There was no or no substantial cross-examination by Mr Hale of the witnesses. There was no evidence preferred. There were some limited submissions particularly at the end where the first defendant was concerned that I should not make certain adverse comments. The only substantial point the first defendant made was to the effect that my judgment would therefore mean that there would be no impediments or other challenges to practical completion, the point which I regarded as wrong and said so in my judgment. The claimant does not seek its costs from the first defendant and, in my judgment, it is a matter for the first defendant whether it

should participate but I do not see why the claimant should pay for that and, therefore, the first defendant will bear its own costs.

8 I do not know whether any parties are asking for interim payment orders or anything like that. That falls to the third and second defendants.

9 I actually think that I have got to deal with the question of interim payment as best I can. It was incumbent on the second and third defendants to get their full costs schedules together and give it to the claimant in good time. That has not been done. I am under an obligation, unless justice demands otherwise, to make an interim payment order and I consider that I ought to do so but I cannot possibly do it in the circumstances that have arisen, on the sort of figures that have been there.

10 I am going to have to take a different view on this. Had it been 50 per cent of the 40 per cent, you would be down to about £100,000 and, obviously, so far as the second defendant is concerned, if you took 50 per cent of £130,000, you are down to £65,000. I think the right order to make is £75,000 as the payment on account for D3 and £60,000 payment on account for D2. Incontestably, in my judgment, they will recover that much and that is really all I need to be concerned with. It will then be a matter for the parties in the usual way if they wish to avoid a detailed assessment to try and settle the costs globally.

11 As for permission to appeal, while it was an interesting point, that is not the criterion by which I have got to judge permission to appeal. It was a point of construction. It was not a point of primary fact but, on the other hand, in my judgment, as I hope is reflected in it, the outcome was entirely plain. There is therefore no real prospect of a successful appeal and

no other compelling reason for an appeal, so I am afraid you will have to go to the Court of Appeal if you wish, Mr Dennison. Thank you for that.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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