IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 2444 (TCC)

No. HT-2018-000128

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 14 August 2020

Before:

MRS JUSTICE O'FARRELL DBE

B E T W E E N :

KEADBY GENERATION LTD — Claimant

- and -

(1) PROMANEX (TOTAL FM & ENVIRONMENT SERVICES) LTD
(2) REMA TIP TOP INDUSTRY UK LTD — Defendants

MR A. CONSTABLE QC (instructed by Kennedys LLP) appeared on behalf of the Claimant.

MR M. MCMULLAN QC (instructed by DWF Law LLP) appeared on behalf of the First Defendant.

MR S. CATCHPOLE QC (instructed by Clyde & Co LLP) appeared on behalf of the Second Defendant.

J U D G M E N T

MRS JUSTICE O'FARRELL:

1 This is a hearing to determine the claimant's application to re-amend the particulars of claim. The case concerns a fire which occurred at Unit C, Ferrybridge Power Station in West Yorkshire on 31 July 2014. The claimant is the owner of the power station. The first defendant ("Promanex") was engaged by the claimant to provide maintenance services at the power station, including repair works to the shell of the absorber of the flue gas desulphurisation plant. The second defendant ("Rema") was engaged by the claimant to carry out rubber removal and repair works to the lining of the absorber.

2 The claimant's case is that the fire was caused by hot work carried out by Promanex in the absorber on 31 July 2014, in particular through the ignition of combustible material, that is welding spatter and/or grinding sparks generated by Promanex's hot works and/or rubber dust produced by Rema's removal or repair works. The claim is for damages in the sum of about £56 million in respect of property damage and business interruption losses. The defendants deny liability and dispute quantum.

3 This matter was last before the court for the pre-trial review on 27 July 2020; the trial is listed to start at the beginning of October of this year. At the PTR, a draft amendment had just been served by the claimant. It was not dealt with by the court on that occasion because the parties had not had sufficient time to consider it. Therefore, the court agreed to make time available during vacation to deal with this application if no agreement could be reached between the parties. Subsequent to the PTR, a further change draft was served by the claimant on the defendants. No agreement has been reached as to all of the amendments and therefore, on 7 August 2020, this application was issued.

4 There are two broad categories of amendments which are sought. The first, which have not troubled the court today, are those in relation to quantum. The defendants are content with those amendments, no doubt because they reduce the value of the claim. Subject to a request that the claimant complete any additional disclosure of documents in relation to quantum, those amendments are agreed.

5 The second category of amendments is opposed by both the first and the second defendants and can be broadly described as the liability amendments.

6 Firstly, they relate to the rubber repair works and rubber removal works carried out by Rema. At para. 25(a), the claimant seeks to add in a reference to the work carried out by Rema as including the removal and replacement of areas where the rubber lining in the absorber had become de-bonded. In para. 27, the proposed amendment is to the works actually carried out, namely removal and replacement of an area of rubber lining which had become de-bonded (that is the repair works) and stripping back the rubber lining to allow any necessary repairs to be carried out to the steel shell by Promanex (those are referred to as the rubber removal works).

7 At para. 33, the amendment seeks to add in further details as to the alleged cause of the fire. The current pleading is that the cause of the fire was ignition of rubber dust and/or surrounding debris by sparks from Promanex's stick welding process. The proposed amendment adds in the reference to welding spatter and/or grinding sparks from Promanex's stick welding process. Additional matters are sought to be relied upon as facts and matters in support of that assertion of causation. Firstly, in addition to the

reference to the rubber lining works, the claimant seeks to add in the process of the rubber removal works by Rema; in particular, an assertion that the rubber repair works produce rubber dust. At sub-paragraph (ii) it is alleged that the dust produced by the rubber removal works and the rubber repair works, including grinding the rubber lining, is easily ignited by grinding sparks and welding spatter. At 33(ii)(a), the claimant seeks to add in a further assertion regarding causation, namely the most susceptible ignition configuration is the V or interface created by a joint between two materials, such as between two scaffold boards, scaffold board and plywood, scaffold board and rubber lining, plywood and rubber lining. Another configuration identified as susceptible to ignition is the horizontal gap between two combustible materials such as overlapped scaffold boards.

8 At para. 33(A), the claimant seeks to introduce a new allegation, that is to the extent that, contrary to the claimant's primary case at para. 32, consideration is given to whether the fire started on level 5. At (i), it is pleaded that the nature and extent of the scaffold boarding at level 5 in the radial vicinity of the hot works is not known by the claimant. However, that should be within the knowledge of the defendants on the basis that their operatives were working in the absorber in the days preceding and on the day of the fire, and the second defendant in particular made requests to adjust the scaffolding in order to access certain areas. At (ii), it is pleaded that to the extent that the scaffold boarding existed at level 5 in the radial vicinity of the hot works, the most likely cause of the fire is still Promanex's hot works carried out on 31 July 2014 by ignition at level 7 as set out above or by reason of welding splatter from igniting combustible material on level 5, which material is likely to have included dust from the rubber removal works and rubber repair works carried out by Rema on level 7. It is not

a necessary part of proving causation for the court to be persuaded on the balance of probabilities on which level the fire in fact started. It need only conclude that on the balance of probabilities it was Promanex's hot works and/or contributed to by the existence of rubber dust for causation to be established in addition to breach for the claimant to succeed. At (iii) it is pleaded that to the extent that scaffold boarding did not exist at level 5 in the radial vicinity of the hot works, this fact, taken together with the other facts and matters, makes it more likely that the claimant's primary case as to the level on which the fire started is correct.

9 It follows that the claimant wishes to add to the pleading firstly, a reference to the rubber repair works carried out by Rema in addition to the rubber removal works carried by Rema as contributing to the cause of the fire; secondly, to include a possible theory that the fire might have started on level 5; thirdly, to include a possible mechanism of the fire being caused in the crevice of various materials (referred to by the parties as the "crevice theory").

10 The amendments are opposed by the defendants on the grounds that they are being sought too late; they have not properly been pleaded; and there is insufficient time for them to be adequately considered by the experts and the parties so that the parties will be ready for trial.

11 The court's guidance in relation to late amendments is well known and not in dispute. At para. 17.3.8 of the **White Book** in relation to late amendments, reference is made to the case of *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345, in which Coulson J, as he then was, described lateness as:

> "… a relative concept but that an amendment is always in principle late if it could have been advanced earlier, therefore the question of when an amendment might have been sought should not be eclipsed by the potential complexity or importance of the arguments advanced by the amendment.
>
> An amendment that should have been raised at trial may be found an abuse of process if sought to be raised only at the assessment of quantum. An important factor for the court to consider when permission to amend is sought close to the trial date is whether the amendment would put the parties on an unequal footing or will place or add an excessive burden to the respondent's task of preparing for trial so as to jeopardise the trial date or so as to inevitably cause a postponement of the trial. A very late amendment is one made when the trial date has been fixed and where the grant of permission to amend would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept.
>
> A heavy burden lies upon a party seeking a very late amendment. He must provide a good explanation as to why he did not apply earlier and must show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it."

12 Reference is also made to the guidance given by Carr J, as she then was, in the case of *Su-Lin Quah v Goldmans Sachs* [2015] EWHC 759 at [38].

13 In this case I consider that the amendments are being made very late in that we are now in the middle of August and the trial is due to start at the beginning of October. There is, therefore, a period of just over six weeks before the parties must commence their openings. In those circumstances, the claimant does have a heavy burden to explain to the court why the amendments are being made late and to establish that no injustice would be caused to the other parties.

14 The explanation that has been provided by the claimant, through its solicitor's witness statement and also through leading counsel Adam Constable QC today, is that the

proposed amendments arise out of the experts' evidence and the factual evidence that has been served by all parties. In particular, reliance is placed on the contents of the experts' joint statements, the reports of the fire investigation and engineering experts, principally Professor Lygate and Dr Woodward, and the witness statements that have been produced by Rema. It is submitted by Mr Constable that the matters the subject of the proposed amendments, have already been considered by the experts in their discussions and in their reports. If and to the extent that any further testing is required, that could be carried out fairly readily within a period of about two weeks. The defendants have failed to identify any specific factual evidence that would be required as a result of these amendments and also have failed to identify the additional disclosure that they say they would need. In those circumstances, it is submitted, the amendments should be allowed.

15 For their part, Mr McMullan QC, leading counsel for Promanex, and Mr Catchpole QC, leading counsel for Rema, submit that there would be real prejudice if the defendants were required to face these late amendments at this stage. The cumulative effect of the amendments would be that the experts would need to consider what additional testing would be required and many more details would be required from the claimant before any testing protocols could be put in place, let alone additional testing carried out and the results then considered for the purpose of the evidence in court. Further, it is submitted that the pleaded amendments to date do not provide an adequate basis on which the court should be invited to consider the new case in that there is insufficient precision and inadequate particulars that would be needed for the court to properly allow the amendments and consider the new theories put forward.

16 I am going to take them in the categories that have been identified by Mr Constable in his skeleton argument.

17 First of all, the inclusion of the rubber repair works carried out by Rema. These are the amendments that are set out at paras. 25(A)(i), 27(i) and 33(i) and (ii) of the proposed pleading. The fact that works were carried out by Rema by way of repairs and that those repairs would have produced dust is a matter that has been covered by Rema's factual evidence, namely Mr Brennan in his witness statement. Professor Lygate, the claimant's expert, has considered in his report the contribution of the rubber dust produced by the repair works to the cause of the fire. His report was served on the other parties on 22 June of this year. Mr Woodward, Rema's expert, has also considered the repairs carried out to the rubber lining by Rema in his report and, indeed, has identified at fig. 5 in his report the location where those repairs were carried out. To that extent, the fact of these additional repairs, the procedures that were undertaken by Rema in carrying out such repairs and the consideration of the contribution that the rubber dust caused by those repairs might make to the start of the fire are already in the evidence that has been produced by the parties. If and to the extent that further testing in relation to dust produced by the rubber repair works is needed, it has been suggested by Professor Lygate that that could be carried out within two weeks or so and that is accepted by Dr Woodward in his recent correspondence.

18 It therefore appears to the court that that is a matter that is clearly set out in the pleaded case, there is already factual and expert evidence in relation to it and, if and insofar as further testing is required, that could be accommodated in order to be ready for trial.

19 I turn to the second category of amendments, that is the new allegation at para. 33(A) relating to a possibility that the fire started on level 5. The claimant's primary case is that the fire started on level 7. It is clear from the joint statement produced by the fire experts that they have actively considered where the fire started, in particular at item 3 in the schedule to their joint statement. It is also clear from the joint statement and from the expert reports that no one is positively putting forward a case that the fire started on level 5. As Mr McMullan pointed out in his submissions today, in his letter dated 12 August 2020 Professor Lygate, even now, does not support a theory that the fire started at level 5. That reticence on the part of the experts is reflected in the wording of the proposed amendment which is that: "To the extent that contrary to KGL's primary case, consideration is given to whether the fire started on level 5." What then follows is a series of factors that might give credence to that possibility. But the defendants, quite rightly, point out that this is a speculative amendment and that it has not been put forward even as the claimant's alternative positive case. To that extent, they quite rightly are concerned that there is no evidence from any of the factual witnesses as to the precise configuration of the scaffolding and there is no theory put forward by any of the experts that they would wish to support that would explain how and why the fire in fact started on level 5 as a realistic cause of the fire. In those circumstances, there is no adequate alternative theory and certainly nothing that would allow the experts to identify and carry out the relevant tests that they would need in order to test and/or support or rebut that particular theory.

20 I then turn to the third category of amendment, which is the crevice mechanism. That is sought to be included in para. 33(2)(a), namely that material accumulated in a crevice could have been the source of the ignition. This theory was initially raised by Professor

Lygate in the discussions with the experts and is put forward at item 35 of the joint statement as a potential source of ignition, i.e. dust in the crevices. The crevice theory has been considered by Dr Woodward in his report as one of various plausible mechanisms in terms of the cause of the fire. The claimant relies on stills from video footage shot which, it is said, shows dust smoke in the crevices between the boards. That is the factual basis on which it would appear Professor Lygate rests his theory. To that extent, the theory has been articulated in the joint statement; it has been considered by the defendants' experts; and it is a matter on which the evidence, such as it is, has been identified.

21 Having considered those three categories of amendment, I then come to consider whether, in all the circumstances, the court should allow them. It seems to me that the amendments are late but that the claimant has put forward a good explanation for lateness, namely that they arise out of the deliberations and reports of the experts and reflect theories and/or explanations on which Professor Lygate now seeks to rely. Mr Catchpole has identified criticisms that he seeks to make of the theories that are put forward by Professor Lygate. Of course, those are matters that can be tested through cross-examination. What the court is concerned to do today is to determine whether or not the proposed amendments have been pleaded with sufficient clarity and the experts either have had or will have an adequate opportunity to consider them so that the parties have a proper and fair opportunity to deal with them at trial.

22 As to the first category, the rubber repair works, I am satisfied that they are properly pleaded. It is effectively an extension of the case that is already pleaded. As Mr McMullan submitted, the claimant has always relied upon rubber dust as a potential

source of the fire. There is factual evidence that explains what the repairs were, where they were carried out and how. Therefore, there is a factual basis on which the parties can consider the validity or otherwise of the new theory. They have already been considered by the experts and I am satisfied that no real prejudice would be caused by the court permitting those to go ahead. So, I will allow the amendments proposed at 25(A)(i), 27(i), 33(i) and 33(ii).

23 Turning to the second category, that is the introduction of the level 5 theory, I refuse the application to amend as set out at para. 33(A). Unlike the earlier amendment to which I have referred, this is not supported by the claimant's expert. There is very little evidence as to the configuration of the scaffolding at level 5. I say very little, it might be argued that there is none, but certainly there is not a witness statement on which the claimant could rely that establishes a factual basis for this new pleading. It is not supported by Professor Lygate. It has been discussed by the experts, but none of the experts is putting this forward as a potential cause of the fire. I accept the defendants' complaint that, as pleaded, it is not sufficiently clear and coherent so as to enable them to decide what evidence, expert or otherwise, they might need to deploy in order to rebut it. In my view, it is a speculative amendment and, given its lateness, I refuse it.

24 Turning then to the third matter, the crevice mechanism which is proposed to be included at para. 33(ii)(a), that is a matter that has been discussed by the experts. It has been put forward by Professor Lygate. It is part of the joint statement. It has been considered by the experts in their reports. There is a debate between the parties as to whether it is necessary to include this pleading as it is effectively a theory put forward by one of the experts. But, nonetheless, I consider that it is sufficiently clear so as to

allow it to go forward as an amendment because I am satisfied that the parties already know what this theory is and the experts are well placed to respond to it. Therefore, there is no prejudice that will be suffered by the defendants in dealing with it.

25 For those reasons, I will allow some but not all of the amendments. It goes without saying that if and insofar as the defendants require further clarification and/or information from the claimant arising out of these amendments, then they have permission to raise such queries and clarifications but also must do so with due expedition. I am also very keen that the experts should meet as soon possible and identify any further testing that they consider might be needed so that that can be accommodated in good time before trial. Of course, if the experts were to identify further testing that could not be accommodated in time for the trial, then no doubt the defendants and/or claimant will bring the matter back before the court.

APPROVED