Neutral Citation Number: [2020] EWHC 3293 (TCC)

Case No: HT-2019-000434

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Thursday 3rd December 2020

Before :

MR ROGER TER HAAR QC
Sitting as a Deputy High Court Judge

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Between:

EQUIPE REGENERATION LIMITED
Claimant

- and –

(1) HIGGINS CONSTRUCTION LIMITED
(2) HIGGINS GROUP PLC
(3) MOTT MACDONALD LIMITED

Defendants

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James Hatt (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Helena White (instructed by **Birketts LLP**) for the **First and Second Defendants**
Brenna Conroy (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Third Defendant**

Hearing date: 20 November 2020

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3 December 2020 at 10:30 am.

Mr Roger ter Haar QC :

1. There are before the Court two applications made by the Claimant:

   (1) For an extension of time for service of the Particulars of Claim;

   (2) For disclosure from the First and Second Defendants.

2. As will be seen below, the first of these applications was in the end relatively uncontroversial. The second was contested.

3. The hearing of the applications took place remotely, which took place relatively smoothly although there were a couple of moments when counsel for the Claimant ("ERL"), Mr Hatt, lost connectivity. I am satisfied that these slight problems did not prevent a fair hearing.

Background facts

4. The disputes between the parties arise out of a suite of contracts dated 4 June 2007 that relate to the Brockley Social Housing PFI Project ("the Project"). These include:

   (1) The "Project Agreement" between Lewisham Borough Council ("Lewisham") and Regenter B3 Limited ("Regenter") for the refurbishment, maintenance and repair of residential properties owned by Lewisham in Brockley;

   (2) The "Refurbishment Agreement" between Regenter and the First Defendant ("Higgins");

   (3) The "Maintenance Agreement" between Regenter and ERL;

   (4) The "Deed of Appointment" to which (among others) Lewisham, Regenter, Higgins, ERL and the Third Defendant ("MM") were party, and by which MM was appointed as the Independent Certifier under the Project Agreement. MM assumed duties to ERL (among others) under the Deed of Appointment.

   (5) The "Interface Agreement" to which (among others) Regenter, Higgins, the Second Defendant ("Higgins Group") and ERL were party. Under the Interface Agreement, Higgins agreed with ERL to comply with its obligations under the Refurbishment Agreement, and Higgins Group guaranteed Higgins's obligations.

5. Higgins's role was to carry out refurbishment works, whilst ERL was and is responsible for maintenance works. Both ERL and Higgins were sub-contractors to Regenter.

6. It is ERL's case that:

   (1) Refurbishment works were carried out by Higgins and certificates were granted by MM. The last such certificate appears to have been issued on 23 May 2011;

   (2) From November 2019 onwards, a significant number of alleged defects were notified to ERL by Regenter with an instruction that ERL notify the same to Higgins. Subsequently ERL notified Higgins of these alleged defects;

(3) From the description of the alleged defects in the notifications, it appears likely to ERL that the alleged defects may include matters that should have been addressed and rectified by Higgins when Higgins carried out the original refurbishment works and/or matters which should have been identified by MM as ones that should have prevented the issuance of Availability Certificates for those works. In the circumstances, ERL accordingly may have claims against Higgins (and Higgins Group as guarantor) under the Interface Agreement and/or against MM under the Deed of Appointment arising out of those alleged defects;

(4) Protective proceedings were accordingly issued by ERL on 29 November 2019.

Extension of Time for Service of the Particulars of Claim

7. On 30 April 2020 ERL made an application for a declaration that the proceedings had been validly served and for a stay of the proceedings and an extension of time for service of the Particulars of Claim.

8. A consent order dated 15 June 2020 declared that the Claim Form had been validly served, stayed the proceedings until 11 September 2020 and extended time for service of the Particulars of Claim until 18 September 2020.

9. The application now before the Court is for an extension of time for service of the Particulars of Claim to 11 March 2021. MM is agreeable to this application upon the basis that ERL use reasonable endeavours to complete the Pre Action Protocol process within that period.

10. For ERL, Mr Hatt emphasised that there had been an extensive process on the part of the Claimant in gathering information from a number of sources, as described in a second witness statement from Ms Susan Wandless, an in-house solicitor in the employ of Rydon Group Limited, the ultimate parent company of ERL. Information had been sought from:

(1) Higgins;

(2) MM;

(3) Regenter;

(4) Previous shareholders in ERL;

(5) ERL's former lawyer;

(6) A former ERL employee;

(7) A former Higgins employee; and

(8) An independent expert.

11. The result of these inquiries was that as of 11 November 2020 ERL had 864,000 documents to consider. It is to be noted that the defects may concern up to 2,000 dwellings.

12. In support of ERL's application, Mr Hatt relied upon five matters:

    (1) The present public health crisis has delayed ERL's work;

    (2) All parties concerned were having to try to identify and produce old information;

    (3) ERL's team still need time to digest the information provided so as to plead the matter properly;

    (4) The extension of time would allow time for a Pre Action Protocol process to take place;

    (5) MM has agreed to the extension of time requested. It is desirable that there should be the same timetable for all three defendants in the proceedings.

13. I indicated to Ms White, appearing for the Higgins companies, that I regarded all these points as being valid. She took instructions and indicated that her clients would not continue with opposition to the extension of time subject to two provisions: first that the end date should be the subject of an unless order; and, second, that ERL should send a Pre Action Protocol letter by 1 January 2021.

14. I have some sympathy with both these points. When reading the papers before the hearing, I was struck by the absence of any clear articulation of ERL's case.

15. It seems to me likely that a substantial claim is going to be made, but there is no document which I have noted which sets out a clear structure of the claims against Higgins and MM, although, of course, one can deduce what the claim is likely to be.

16. In my judgment, it is desirable that a clear and full pleading should be presented as soon as possible, and that its presentation should be preceded by exchanges of information and positions through a Pre Action Protocol procedure.

17. Accordingly, the points taken by Ms White are well made, but in my view need to be softened slightly.

18. Firstly, whilst I regard a Pre Action Protocol letter to be important, it seems to me reasonable to require it by 8 January 2021, rather than on 1 January 2021. I order that the extension of time for service of the Particulars of Claim will be subject to a condition that ERL use best endeavours to serve the PAP letter by 5 p.m. on 8 January 2021.

19. Secondly, in my judgment making an unless order at this stage is likely to induce procedural wrangling. Instead, I order that the date for service of the Particulars of Claim will be 11 March 2021. However, ERL will be at liberty to seek an extension of time, but in principle only if an application for an extension of time is made to this Court not later than 14 days before 11 March 2021. I have been asked to reserve any such application to myself for determination, and I so order.

Disclosure

20. When first issued, the application for disclosure of documents listed 9 categories of documents.

21. The categories of documents in contention have now reduced to two categories, as set out below.

22. ERL bases its application in large measure upon provisions of the Interface Agreement. Clause 6.1.1 of the Interface Agreement provides:

> "6.1.1 Each Sub-Contractor undertakes with the other Sub-Contractors and, in the case of (c) and (d), Project Co that:-
>
> "(a) it shall promptly comply with all its obligations under its Sub-Contract and this Agreement to the extent necessary to avoid causing the other Sub-Contractors any additional cost (over and above that which they would ordinarily incur in the performance of their obligations under their respective Sub-Contracts and this Agreement), delay and/or disruption;
>
> …
>
> "(c) it will provide in good faith such support and assistance to the other Parties as may be reasonably required in accordance with the provisions of paragraph 1.1 of Schedule 3;"
>
> …
>
> "(e) it will not impede or hinder the other Sub-Contractors in the performance of their obligations under the respective Sub-Contracts …"

23. Schedule 3 paragraph 1.1 provides:

> "Each Sub-Contractor (the "Assisting Party") agrees that it will provide all such assistance and support to the other Parties as is reasonably incidental to the proper performance of its obligations contained in its Sub-Contract. Such assistance and support shall include without limitation the provision of information in response to any reasonable request made by a Party (the "Requesting Party") that is required in order to enable the Requesting Party to fulfil its obligations under its Sub-Contract and/or this Agreement and the provision of any other information of which the Assisting Party becomes aware during the course of the carrying out of its obligations which is or is likely to be relevant to the performance by any Party of its obligations under a Sub-Contract or this Agreement."

24. In my judgment, Ms White on behalf of the Higgins companies is right in her submission that the obligation in these provisions is to provide *"all such assistance and support to the other Parties as is reasonably incidental to the proper performance of its obligations contained in its Sub-Contract"* (emphasis added).

25. In this case it is clear that the information is required by ERL primarily to assist it in putting forward its case in these proceedings, as is made clear from paragraph 75 of Ms Wandless's second statement. It is to be noted that neither in Ms Wandless's statements nor in that of Mr Irvine of Rydons Maintenance Ltd is a case put forward

that this disclosure is required for "operational" reasons (i.e. to allow ERL to carry out its maintenance functions) rather than in order to pursue ERL's claims in this litigation.

26. An alternative way in which the case could have been put would be under the Court's powers under CPR 31. Ms White submits, correctly, that this is not a case of Pre-Action Disclosure, proceedings having been commenced. Nor has the usual time for disclosure in the course of proceedings yet arrived. Thus, she submits, this can only be an application for specific disclosure under CPR r. 31.12. In that regard, she cites paragraph 31.12.2 of the commentary in the White Book:

> "The court will need to satisfy itself as to the relevance of the documents sought, and that they are or have been in the party's control, or at least there is a prima facie case that these requirements will be met. The relevance of documents is analysed by reference to the pleadings, and the factual issues in dispute on the pleadings: Harrods Ltd v Times newspaper Ltd [2006] EWCA Civ 294; [2006] All E.R. (D) 302 (Feb) at [12]. Where a claim is likely to turn on particular documents there is a stronger case for an order to be made: *Chantrey Vellacott v Convergence Group Plc* [2006] EWHC 490 (Ch) Rimer J … (in that case particular emails and draft documents)). "

27. I am now concerned with two categories of documents: as I have indicated, originally the list was much longer. Those categories are:

(1) Category 4: The Refurbishment Contract Quality Plan as required by Schedule 2 Annex 8 paragraph 1.2 of the Refurbishment Agreement and details of the quality assurance systems provided by the First Defendant in respect of that Plan (including relevant communications with the Third Defendant);

(2) Category 8: All information prepared in respect of Section 3 Provision of Information to the Authority by the Contractor and Sub-Contractor pursuant to Schedule 19 Works Procedure in the Refurbishment Agreement.

28. In his submissions, Mr Hatt took me to documentation in the bundle which raised reasonable expectations that documents in categories 4 and 8 ought to exist, for example, in respect of the contractual deliveries by way of handover documents, which should have included health and safety files and O and M manuals.

29. Despite those submissions, I decline to order disclosure as sought, for the following reasons:

(1) I accept Ms White's submissions that the case is not made out that their disclosure is required as being reasonably incidental to the proper performance of ERL's sub-contract responsibilities;

(2) I also accept that the time has gone for pre-action disclosure;

(3) It seems to me on the basis of Mr Kelly's second witness statement that either the documents do not exist (for example in respect of category 4 and the asbestos

surveys in category 8) or have already been provided (for example in respect of the health and safety files);

(4) Neither category of disclosure is necessary at this stage to enable a Pre Action Protocol letter to be written or Particulars of Claim to be drafted.

30. Thus at this stage the disclosure sought is not ordered: I leave for consideration whether disclosure may be seen to be appropriate at a later stage. However, I would comment that Higgins did appear to me to be at certain points less co-operative than might be desired. I have in mind in particular paragraph 3.5.2 of Mr Kelly's second statement in which he identifies the information already uploaded which might form part of a "typical H & S file". That documentation is not identified. It would be reasonable for it to be identified. I make no order in that regard at the moment, but suggest that Higgins and its legal team might well think it advisable to be more co-operative in future.

Conclusion on the applications

31. For the above reasons, I grant the extension of time for service of the Particulars of Claim upon the terms set out above, and decline to make an order in respect of the last two categories of disclosure sought.

Costs

32. In the draft of this judgment circulated to the parties I indicated that the costs of MM would be costs in the case, and invited submissions as to what other orders as to costs should be made. I have received two extensive rounds of submissions from Mr Hatt on behalf of ERL and Ms White on behalf of the First and Second Defendants.

33. It seems to me in broad terms that ERL won on the issue of an extension of time: the First and Second Defendants did not concede what was a reasonable request for an extension of time. On the other hand ERL sought but did not obtain an order for disclosure, and therefore the First and Second Defendants can be said to have won on that application.

34. Both applications seem to me in the nature of preliminary skirmishes in the overall battle where all the parties are being forced to come to grips with investigations of what happened many years ago. Whilst each party was unsuccessful on one application, the work undertaken in preparation for the hearing was to a very large extent work which was necessary for the prosecution of each party's case in any event.

35. There is also a degree of interplay between the two applications: the background to the application for an extension is the need for ERL's team to investigate and consider a mass of documentation. On the other hand the First and Second Defendants are suffering from an absence of a clearly articulated claim against them.

36. In all the circumstances it seems to me that the fair order is that the costs of all the parties should be costs in the case, which seems to me more satisfactory than the alternatives of either ordering costs in favour of each party on one application or making no order for the costs of the applications.

37. It follows that the costs will fall for assessment on the standard basis.