



Neutral Citation Number: [2022] EWHC 906 (TCC)

Case No: HT-2020-000433

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 13/04/2022

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

Between:

EVOLVE HOUSING + SUPPORT

Claimant

- and -

(1) BOUYGUES (U.K.) LIMITED

**(2) POTTER RAPER PARTNERSHIP (A
FIRM)**

(3) STRIDE TREGLOWN LIMITED

Defendants

-and-

RICHARDSON ROOFING COMPANY LIMITED

Third Party

-and-

**SALUS (BUILDING CONTROL & FIRE SAFETY
CONSULTANTS) LIMITED**

Fourth Party

Saleem Khalid (instructed by **Winkworth Sherwood LLP**) for the **Claimant**
Paul Cowan (instructed by **Mayer Brown LLP**) for the **First Defendant**
Diarmuid Laffan (instructed by **Keoghs LLP**) for the **Second Defendant**
Tom Owen (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Third
Defendant**
George Richardson (Director) for the **Third Party**
Helena White (instructed by **BLM LLP**) for the **Fourth Party**

Hearing date: 25 February 2022

JUDGMENT

Mr Roger ter Haar QC :

1. This matter came before me on 25 February 2022 for a Costs and Case Management Conference. Unfortunately the time allowed proved to be inadequate to conclude all the necessary business. In particular my decision on a Request for Further Information remained outstanding, although the issues had been fully (and ably) argued by the relevant parties. This judgment contains my decision in that regard. This will leave outstanding discussion of the parties' costs budgets, for which a further hearing date will take place.
2. The Claimant ("Evolve") is a charity and registered provider of social housing.
3. The First Defendant ("BYUK") was at all material times a design and build contractor.
4. The Second Defendant ("PRP") was at all material times a construction consultancy.
5. The Third Defendant ("STL") was at all material times a firm of architects.
6. The Third Party ("Richardson") was at all material times a building envelope contractor.
7. The Fourth Party ("Salus") was at all material times an approved inspector.
8. By a contract dated 28 February 2011 Evolve engaged BYUK to design and build a new YMCA hostel at Alexandra House, Dingwall Road, Croydon.
9. The works commenced in around March 2011. Practical Completion was achieved on or about 22 March 2012.

10. Evolve engaged PRP as the Employer's Agent for the project.
11. On 20 September 2010 BYUK engaged Warings Contractors Limited ("WCL") to carry out and complete the design and construction works. BYUK's case is that BYUK subsequently purchased WCL's business and undertakings.
12. On 13 May 2011 WCL engaged Salus to provide Building Control services.
13. On 8 July 2011 WCL engaged STL to provide services. Without at this stage deciding precisely what services STL was to provide, its services included:
 - (1) Design development, including co-ordination of the designs of other consultants, subcontractors and suppliers and integration of such work into the overall design;
 - (2) Preparation of design drawings;
 - (3) Production of large scale external wall section drawings, external envelope construction details, fire protection drawings and specifications;
 - (4) Attendance at meetings as agreed with WCL in connection with the design of the works and inspecting generally the progress and quality of the work.
14. On 27 June 2012 STL executed a warranty in favour of Evolve. Evolve's claim against STL in contract is founded upon this warranty. The contractual standard under the warranty is to exercise all reasonable skill, care and diligence to be expected of properly qualified and competent architects.
15. Evolve's case alleges that there were fire safety defects in the façade of Alexandra House. There are, in essence, two cladding systems at the Property:

- (1) A terracotta cladding system. The terracotta tiles were a proprietary product: KeraTwin K3. This system was supplied, designed and installed by KTD Facades Limited (“KTD”), seemingly a specialist sub-contractor to WCL. The sub-contract between WCL and KTD was dated 29 September 2012.
 - (2) A copper cladding system. These panels were another proprietary product: TECU Bronze KME panels. As below, the system was supplied, designed and installed by Richardson as a specialist sub-contractor to WCL. The sub-contract between WCL and Richardson was dated 17 May 2011.
16. It is Evolve’s case that opening up works revealed widespread and dangerous fire safety defects to the copper and terracotta clad external walls. These are alleged to include:
 - (1) Missing and defectively installed fire cavity barriers;
 - (2) Missing fire collars and dampers around service penetrations;
 - (3) Excessive gaps around window openings with missing fire stopping at such junctions;
 - (4) Defectively installed insulation boards;
 - (5) The use of (combustible) plywood within the wall construction of the copper cladding system.
17. Evolve also claims that as a consequence of the widespread nature of those categories of defects it was necessary to replace the terracotta and copper clad external walls. Evolve claims that as a consequence of these defects, BYUK,

PRP and STL all failed in their contractual and tortious duties in that the work undertaken by them in connection with the design and/or installation and/or inspection of the external walls and all constituent parts fell below the standard reasonably to be expected.

18. The application with which this judgment is concerned is an application by STL that Evolve should be ordered to provide Further Information in answer to Requests served on 28 April 2021.
19. Evolve responded to those Requests on 26 May 2021. STL says that Evolve failed to particularise its case on causation and breach. The thrust of Evolve's position was that it was unable properly to plead until it had been provided with disclosure of the designs for, and inspection records of, the property.
20. The Requests in respect of which STL seeks orders are Requests 13, 18, 19, 20, 21 and 23.
21. In *Building Design Partnership v Standard Life* [2021] EWCA Civ 1793; [2022] 1 WLR 878 at [39] to [41] Coulson L.J. recently affirmed the applicable pleading standards to be applied in a professional negligence claim:

“39. On this topic, Mr Moran referred to a decision of mine at first instance in the TCC, *Pantelli Associates Ltd v Corporate City Developments No2 Ltd* [2010] EWHC 3189 (TCC); [2011] PNLR.12. In that case, I had regard to CPR 16.4(1)(a) and the meaning of the phrase “a concise statement of the facts on which the claimant relies”. ““At [11] I said:

“11. CPR 16.4(1)(a) requires that a particulars of claim must include “a concise statement of the facts on which the claimant relies”. Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions,

and the loss that eventuated. Those are ‘the facts’ relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert’s report) can be obtained by both sides which address the specific allegations made.”

40. I should stress that, although this summary was part of a judgment in a professional negligence claim, it is not to be read as if it were confined to such claims. These are the basic ingredients of any statement of case against any defendant.
41. The other side of the same coin is that pleadings should not be vague and unparticularised, and if they are, they are liable to be struck out: see the judgment of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm). In that case, Teare J said:

“18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party’s pleaded case is a concise and clear statement of the facts on which he relies; see *Spencer v Barclays’ Bank* 30 October 2009 per Mr. Bompas QC at paragraph 35. The Amended Particulars of Claim are, perhaps, concise but they are not clear or coherent. The transactions which the Defendant is alleged to have conducted in the name of the company without disclosing his conflict of interest and which have caused loss have not been clearly identified. The Further Information could perhaps have cured these defects but it has not done so. The particular transactions cannot be identified with ease. Moreover, additional claims, not foreshadowed or pleaded in the Amended Particulars of Claim, appear to have been added. They have no place in the Further Information since they had not been pleaded in the Amended Particulars of Claim. Further, evidential material has been added in such a way as to make comprehension of the Further Information difficult.”

22. The Requests in respect of which an order is sought are, as I have said, Requests 13, 18, 19, 20, 21 and 23. I set out the Requests and Information already given, as well as the Information given in Response to Request 11, since this is referred to in the other Responses, and encapsulates Evolve’s position.

11. **Of: *breached its duties to the Claimant in negligence*” please particularise:**

(1) The basis and scope of the alleged tortious duty of care, and the facts relied upon.

The Third Defendant was a firm of architects. In accepting their appointment as such and/or in providing a warranty to the Claimant they knew or ought to have known that the Claimant would rely upon them exercising or having exercised the reasonable skill and care of their calling. In the premises they assumed a duty of care to the Claimant. The scope of the duty is coextensive with the tasks which the architects undertook to perform as set out in the Memorandum of Agreement.

(2) Each allegation of tortious negligence. Unfocused repetition of paragraph 27 (allegations against the First Defendant) is not a proper plea and does not appear to disclose any allegations of negligence by the Third Defendant. For example, paragraph 27.1(a) and many others refer to workmanship allegations, without reference to the Third Defendant. The Third Defendant requires particulars of the case on tortious negligence for duty of care, each particularised breach as against the Third Defendant, and causation so that it may be understood and respond.

The case against the Third Defendant is adequately pleaded. As is set out in paragraph 31(a) of the Particulars of Claim, the Third Defendant’s obligations – both under the contractual warranty and in tort – included inspecting, reviewing, assessing and coordinating the design, specification and installation of the cladding system. The defects in the cladding system may result from defective design and/or defective specification and/or defective installation. The Third Defendant has to date failed to disclose any plans, drawings, site diaries, instructions etc. and pending such disclosure the Claimant cannot say whether the Third Defendant’s negligence in respect of a particular defect set out in paragraph 27 of the Particulars of Claim related to negligence in relation to its design, specification or inspection obligations or a combination of the same. However, competent performance of its obligations in relation to design, specification and/or inspection by the 3rd Defendant ought to have avoided the said defects.

Designing and/or coordinating the design of a defective and dangerous cladding system (and/or failing to notice the defects upon any inspection) is a sufficient fact per se in order to ground a tortious claim against the Third Defendant architect. It will only be possible to particularise the precise bases and extent of the Third Defendant’s breaches once it belatedly provides disclosure of its drawings, specialist drawings it coordinated, site meeting records, site inspection diaries etc.

For the avoidance of doubt, it is averred that there is little substantive difference in the nature of the Third Defendant’s duty in tort or in contract in this context.

....

13. Of: “breached its duties to the Claimant ... pursuant to the collateral warranty ...”: please particularise each allegation of breach, and thus for each allegation in paragraph 27, the particularised case as against the Third Defendant “pursuant to the collateral warranty”. Paragraph 27 concerns allegations against the First Defendant, principally workmanship. It does not appear to disclose any allegations of breach by the Third Defendant.

The Third Defendant is referred to the answer at 11(2) above.

....

Of paragraph 31(f): “The cladding system that was negligently designed and specified was therefore wholly or in part due to the role of the Third Defendant as ‘lead designer’ for the Works.”

18. Please clarify:

(1) Which entity/entities the Claimant alleges “designed” the “cladding system”.

Until disclosure of information is provided by the Defendants, it is unclear who exactly designed the cladding system. Nevertheless the reference to the Third Defendant leading and coordinating the design is clear from the contractual warranty and hence is why the Third Defendant is liable in any event for any design breaches. Further, 2.11 of the Memorandum required the Third Defendant Architect to request the information needed to carry out its duties.

It is surprising that the Third Defendant repeatedly makes requests of the Claimant where answers are predicated upon disclosure which the Third Defendant has failed to provide. It is not understood how this can form the basis for the Third Defendant’s refusal to plead a Defence until it had received answers to this RFI.

(2) Which entity/entities the Claimant alleges “specified” the “cladding system”

The Claimant repeats the forgoing sub-paragraph.

(3) The particularised case for responsibility “wholly” on the Third Defendant.

The Claimant repeats the forgoing sub-paragraph.

(4) The particularised case for responsibility “in part” on the Third Defendant.

The Claimant repeats the forgoing sub-paragraph.

Of paragraph 31(g): *“The Third Defendant was required to examine sub-contractors’ and suppliers’ drawings and details with regard to performance criteria and this included designs produced for this cladding system. It was also required as lead designer to coordinate production information. The Third Defendant failed to adequately perform such functions...”*

19. Please particularise:

(1) Each alleged cause of action and failure “to adequately perform” concerning examination. Please particularise which “sub-contractors’ and suppliers’ drawings and details ...[and] designs” it is alleged the Third Defendant “failed adequately to” examine, when, and what it is alleged the Third Defendant failed to do which it ought to.

Again, this can and will be addressed once the designs are provided. It is surprising that the Third Defendant seeks further information predicated upon designs, when such designs have not been disclosed, albeit they must be in the possession of the Third Defendant and have been sought by the Claimant on a number of occasions. Thereafter, the Claimant’s experts will be able to analyse the same and the Claimant will be able to set out its case fully as to the Third Defendant’s design failures, reiterating its duties in respect of the same pursuant to the Collateral Warranty. The Claimant repeats the hereinbefore about how the third Defendant was obliged to have regard to manufacturers’ advice.

The Third Defendant was required to request sub-contractor information and coordinate the designs to ensure compliance with the Memorandum and Employers Requirements, which included the fire cavity barriers and insulation, as set out at length in the Particulars of Claim.

(2) Each alleged cause of action and failure “to adequately perform” concerning coordination. Please particularise which “production information” it is alleged the Third Defendant “failed adequately to” coordinate, when with whom, what it is alleged the Third Defendant failed to do which it ought to.

The Claimant repeats the forgoing.

Of paragraph 31(h): *“The Third Defendant was required to provide information to subcontractors for any necessary review of the proposals. In respect of the cladding system, the Third Defendant failed to provide information to the cladding sub-contractors to correct the non-compliance issues, such as combustible unbranded insulation and the use of plywood.”*

20. Please particularise:

(1) Each piece of “information” the Third Defendant “failed to provide”, to whom (i.e. properly named and identified “cladding sub-contractors”), when, and why.

Details of the defects and deficiencies of the cladding system are set out extensively in the Particulars of Claim.

The Claimant cannot name all the sub-contractors since it does not know who was engaged by the First Defendant. The Defendants ought to know the identity of the relevant sub-contractors.

As for the “information” that should have been provided, the Third Defendant ought to have had regard to the relevant statutory requirements along with its own duties (as aforementioned and cited in the Particulars of Claim) and then passed on whatever information was needed to sub-contractors to avoid the same creating a dangerous and defective cladding system. Even if the Third Defendant had simply pointed out that the cladding system itself was not compliant with ADB, at any stage during the design or construction, it would, if the First Defendant had taken appropriate action, have stopped the Claimant from procuring, and the residents of Alexandra House from procuring, and the residents of Alexandra House from living, in a dangerous development.

At present, given the lack of disclosure from the Third Defendant, it is unclear what, if any, information was provided during the Third Defendant’s design coordination process, to whichever sub-contractors. It is possible that the Third Defendant failed and in breach of its obligations to request the sub-contractor information from the First Defendant, thereby simply leaving the sub-contractors to it, and not giving information, for example about fire resistance requirements for design and installation, for example about fire resistance requirements for design and installation, in which case the Third Defendant will have an opportunity to confirm the same in its Defence, due shortly.

The Third Defendant must also confirm why it did not identify any of the defects pleaded upon the putative inspection regime.

(2) Each issues on “non-compliance”, i.e. the totality of the case not just: “such as”.

The non-compliance with fire resistance requirements is extensively set out in the Particulars of Claim. The Claimant does not propose to repeat the

same herein. Suffice to say that numerous examples/particulars have been given under the following headings. The Claimant looks forward to a substantive defence to any of them:

- (i) Defective fire cavity barrier installation;
- (ii) Defective wall insulation installation;
- (iii) Use of flammable plywood within cladding;
- (iv) Defective Fire Stopping Penetrations and Gaps Around Window Penetrations without fire stopping;
- (v) Defective installation of terracotta cladding panels.

Of paragraph 31(i): “...during the Works, the Third Defendant was to attend meetings on site and to inspect periodically the progress and quality of the Works, yet it manifestly failed to identify and record patently obvious issues, and hence require them to be remediated, all the defects produced by the First Defendant as set out above at paragraph 27. Accordingly its inspection (if at all) was totally inadequate and not fit for purpose.”

21. Please particularise:

(1) Each of the “patently obvious issues”. If the response were to be simply a reference back to paragraph 27 that would not be a proper plea. Paragraph 27 contains a variety of factual and legal assertions against the First Defendant, and some post-performance matters. The Third Defendant seeks a definitive, particularised case on each of sub-paragraphs 27, and each “patently obvious issue”, so that it may respond.

Each patently obvious issue corresponds with the headings of paragraph 27 of the Particulars of Claim:

- (i) Defective fire cavity barrier installation;
- (ii) Defective wall insulation installation;
- (iii) Use of flammable plywood within cladding;
- (iv) Defective Fire Stopping Penetrations and Gaps Around Window Penetrations without fire stopping;

(v) Defective installation of terracotta cladding panels.

For the avoidance of doubt, the Claimant has pleaded that the Third Defendant ought to have seen such patently obvious issues/defects pursuant to its periodic inspection regime. The detail is in the Particulars of Claim. The evidence will be at a later stage and in the experts reports. CPR 18 responses need to be reasonably proportionate, even if the requests are not.

a. For each of those “issues” to be particularised in response 21(1), what it is alleged the Third Defendant ought to have inspected, identified and recorded, when, and why.

Again, it is simply not known when the Third Defendant inspected the development, if at all, as it has refused to disclose its site diaries etc. despite a lengthy pre-action period.

In any event, it is averred that the Third Defendant ought to have tailored its inspections such that it saw each of the ‘issues’ above.

For the avoidance of doubt, it is the Claimant’s case that these issues would have been patently obvious for some time during the construction phase. The details of the allegations under each of the issue heading are in the Particulars of Claim. In the circumstances, and in view of the foregoing, the basis for this RFI is not understood. It is also not understood what if any relevance said RFI has to the Third Defendant’s purported inability to understand the Claimant’s pleaded case or to plead a Defence.

b. Whether it is alleged that the Third Defendant failed to attend inspections when it ought. The plea “its inspection (if at all)” is imprecise and ambiguous. If it is alleged, please particularise the date(s) on which it is asserted the Third Defendant ought to have inspected, but did not; and for each such date, the state of the works at that date, what it is alleged the Third Defendant would have observed had it done so, and why.

The Claimant repeats the forgoing. The Claimant simply does not know when, and if, the Third Defendant attended the site in order to inspect the works. Therefore, it is obviously impossible for the Claimant to assert

when the Third Defendant ought to have inspected and whether or not it missed inspections of the critical issues such as fire cavity barriers.

For the avoidance of doubt, it is the Claimant's case that all of the issues set out in the previous sub-paragraphs reply would have been patently obvious to a competent inspecting architect for some time during the construction phase, if a proper inspection regime was planned and undertaken by the Third Defendant.

The Claimant reserves the right to plead further as to inspection failings if it ever receives a positive case on the same from the Third Defendant.

....

Of paragraph 31(1): *“The Third Defendant failed to identify during periodic site inspections that the rigid phenolic foam insulation installed by the First Defendant was unbranded and thus of unknown thermal quality and unknown fire performance;”*

“23. Please particularise:

“(1) Which “periodic site inspections”, identifying the date(s).

Reply 21 above is repeated.

“(2) For each such inspection, the state of thew [sic] woks [sic] at that date, why at that date the Third Defendant ought to have identified the pleaded issue of unbranded insulation.

“thew woks” is assume to be “the works”.

Reply 21 above is repeated.

23. Before the hearing took place on 25 February 2022, the Court had been provided with witness statements from:

- (1) Helen Morse on behalf of STL, dated 7 January 2022;
- (2) Gregory Carter on behalf of Evolve, dated 16 February 2022;
- (3) Kwadwo Charles Sarkodie, on behalf of BYUK, dated 24 February 2022.

24. After the hearing the Court received two further statements from:

- (1) Gregory Carter on behalf of Evolve, dated 28 February 2022;
- (2) Helen Morse on behalf of STL, dated 1 March 2022.

25. Whilst the service of these two statements was unusual, coming after the hearing, I am prepared to, and do, take both into account.

26. As the Further Information previously provided, and set out above, makes clear, Evolve's principal objection to providing the outstanding Further Information is that it does not as yet have full information as to the role played by STL, both as concerns design and as concerns inspection.

27. I have evidence before me that considerable disclosure has already been made to Evolve.

28. I do not rule out the possibility that the formal disclosure process which is yet to be completed may yet reveal further significant documentation. However, upon the evidence of both Ms. Morse and Mr. Sarkodie, there has already been enough disclosed to enable Evolve to serve Further Information as requested even if it has to be supplemented in due course.

29. I acknowledge that further information will be put forward in a Scott Schedule yet to be served, but it seems to me that STL is entitled to know how Evolve puts its case on the basis of what has already been disclosed.
30. Accordingly, there will be an order for service of the Further Information requested, but it will be open to Evolve to reserve its position in the case that further relevant information becomes available to it.