Case No: HT-2022-000463 / HT-2021-000148

[2024] EWHC 1121 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: Wednesday, 17 April 2024

Before:

MRS JUSTICE JEFFORD

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Between:

(1) LONDON & QUADRANT HOUSING TRUST
(2) QUADRANT CONSTRUCTION SERVICES LTD **Claimants**

- and -

(1) WPHV LTD (In Administration)
(2) WILLMOTT DIXON HOLDINGS LTD
(3) BE LIVING GROUP LTD
(4) WALSWORTH LTD
(5) HARDWICKE INVESTMENTS LTD
(6) WILLMOTT DIXON LTD
(7) BE LIVING HOLDINGS LTD
(8) CHUBB EUROPEAN GROUP LTD
(9) CHUBB EUROPEAN GROUP SE
(10) CNA INSURANCE COMPANY LTD
(11) AXIS SPECIALTY EUROPE SE
(12) ALLIED WORLD ASSURANCE COMPANY (EUROPE) DAC
(13) MS AMLIN CORPORATE MEMBER LTD
(14) AMERICAN INTERNATIONAL GROUP UK LTD
(15) ENDURANCE WORLDWIDE INSURANCE LTD
(16) LLOYD'S UNDERWRITER SYNDICATE NO. 2786 EVE
(17) THE UNDERWRITING MEMBERS OF LLOYD'S SYNDICATE NO. 1861 ATL FOR THE 2019 YEAR OF ACCOUNT
(18) FLECTAT 2 LTD (FORMERLY AMTRUST CORPORATE MEMBER LTD) FOR AND ON BEHALF OF SYNDICATE 1206
(19) THE UNDERWRITING MEMBERS OF LLOYDS SYNDICATE 4711 SUBSCRIBING TO X0A1FCE17A0S
(20) LLOYD'S UNDERWRITER SYNDICATE NO. 2003 XLC
(21) LIBERTY CORPORATE CAPITAL LTD
(22) MARKEL INTERNATIONAL INSURANCE COMPANY LTD
(23) AMTRUST EUROPE LTD **Defendants**

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APPEARANCES

MR M THORNE and MR C EWING (instructed by Devonshires Solicitors LLP)
for the **Claimants**

THE FIRST DEFENDANT did not appear and was not represented

MR D KHOO (instructed by Simmonds & Simmonds LLP) for the **2nd to 7th Defendants**

MR L WYGAS (instructed by CMS Cameron McKenna Nabarro Olswang)
for the **8th and 9th Defendants**

MR T WEITZMAN KC and MR B FOWLER (instructed by Reynolds Porter Chamberlain LLP) for the **10th to 14th, 16th, and 18th to 22nd Defendants**

MR N HEXT KC (instructed by Weightmans Solicitors LLP)
for the **11th and 12th, 14th to 17th, and 20th Defendants**

MR G HILTON (instructed by Shoosmiths LLP) for the **23rd Defendant**

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Approved Judgment

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MRS JUSTICE JEFFORD:

1. An issue has been raised by the claimants as to the legal representation, and I emphasise legal representation, of the two excess layers of defendants, the 2017 and 2019 excess layers. There is an overlap between the insurers concerned, in that defendants 11, 12, 14, 16, and 20 fall into both groupings. Therefore, given the way in which representation is currently before the court, those defendants are represented twice by two different firms of solicitors and two different counsel.

2. Mr Thorne submits, understandably, that that is an unsatisfactory position in the sense that the Civil Procedure Rules contemplate a party being represented by a solicitor and things being done pursuant to the Rules which involve, for example, service on a solicitor and not multiple solicitors. Having said that, I agree with Mr Weitzman KC's submission that there is nothing in the Rules that positively prohibits a party, if it so wishes, from instructing two firms of solicitors and being represented by two firms of solicitors, and, similarly, two counsel. Issues that may arise as to costs and the extent to which cross-examination at trial can be undertaken by multiple counsel are for a later date.

3. It is submitted that the reason for the involvement of multiple legal representatives is the potential for conflict between the different excess layers. Mr Weitzman tells me that within the individual insurers who appear within both groupings, steps have been taken internally to ensure that there is an appropriate Chinese wall, and the instruction of different firms of solicitors ensures that any conflicts of interest do not spill over into the legal representation. He also makes what seems to me the fair point that if the groupings were formulated differently so that there was representation of the defendants only in the 2017 excess layer, only in the 2019 excess layer, and then those who overlap, there would end up being three sets of representation rather than two.

4. In all those circumstances, I am content to leave the representation as it is on the basis that it does not require any regularising by the court. However, everyone will have heard what I have said and bear it in mind in relation to costs in due course. Without pre-empting anything of that nature, the areas where there are conflicts are likely to be limited and, therefore, the expenditure of duplicate costs on all issues of liability and quantum is not likely to be regarded as reasonable.

L A T E R

5. I am not going to make the order that is sought, which is, in effect, an order for early disclosure of tender documentation. Everything that has been said on behalf of the defendants has merit. There is space in the timetable. Whether there is a stay or not is immaterial. There is space in the proposed directions during which a mediation could take place.

6. From what I have read, there has been an unsuccessful attempt at mediation before and the point is made by more than one party that nothing has changed since then and therefore, the prospect of a successful mediation is not in sight unless something does change.

7. One of the things that might change is the provision by the claimants to the defendants of further information as to the remedial works that they propose to undertake, and the cost of those remedial works, which involves or may involve the provision of the invitations to tender and the tender responses. Equally, it may involve the defendants then providing the claimants with their comments on those matters but those are all things that can be done by the parties by agreement and by sensible steps, and certainly do not require an Order of the court.

8. It does not seem to me to be appropriate, simply on the basis that it might be helpful for a mediation, to order a form of disclosure, or, indeed to order comments on the documents duly disclosed.

9. So I do not propose to make the orders that the defendants seek. I will simply reiterate that the provision of such information and, indeed, comments from the defendants may assist in the resolution of this matter at an early stage. However, from what Mr Thorne says, the claimants entirely accept and recognise that and are looking to achieve that in any event.

L A T E R

10. In relation to inspections of the property, there is a history, which I do not intend to recite in any degree of detail, in which there have been two previous inspections by the defendants which have not been satisfactory in the sense that they have not enabled the defendants to see what they would wish to see and, in the case of the inspection planned for 21 March 2024, the inspection was cancelled at short notice. Mr Thorne on behalf of the claimants makes an application for the wasted costs of those inspections incurred by the claimants in providing access and opening-up teams to be paid by the defendants in any event on the basis that their conduct in relation to those inspections was unreasonable and has caused the claimants to incur costs which it ought to recover irrespective of the ultimate outcome of the litigation.

11. The position adopted by the defendants is generally that that is not an appropriate course to take and that the costs of those two previous inspections should simply be costs in the case in what I might describe as the normal way. That is that if the defendants are ultimately found liable, they will bear the claimants' costs of those inspections. If they are not found liable, they will not bear the costs of those inspections.

12. That seems to me to be the obvious position and the one that ought to obtain unless there is a compelling reason to the contrary. The compelling reason is argued to be that in both instances, that is the inspection in September 2023 and the proposed inspection in March 2024, three weeks or less notice of the proposed inspection was given by the defendants and even shorter notice of the particular locations which the defendants and their experts wished to inspect.

13. There is copious correspondence on this subject and a live dispute between the defendants and the claimants as to where blame lies. Mr Hext KC on behalf of all the defendants makes the point that even if only three weeks' notice of the desire to inspect was given, the claimants did not indicate that this was unrealistic. On the other hand, it is quite clear from the correspondence that what the claimants were seeking to do was to accommodate the inspections, to take all steps necessary for the

inspections to be carried out and to invite the defendants to propose inspection locations which could be accessed without the need for further licences or permissions to be obtained.

14. Quite frankly, it seems to me that on this matter honours are, if not even, certainly not uneven enough to warrant the making of an order that the defendants pay the claimants' costs in any event. Rather, they should be in the normal way costs which will follow the event in due course. I am not going to say costs in the case because I do not need to make any order at this stage.

15. The position, however, is that there have been costs already incurred on two potential inspections and yet a further inspection is to be facilitated. Although harmony is not entirely an appropriate way of describing the position of the defendants, there is a large measure of agreement that the defendants are prepared to fund the costs of a future inspection as provided for in the draft in both blue and green in the proposed directions and I will make an order in that respect. Recognising the events that have happened and the previous two abortive inspections, I will order that those costs be divided equally - and I think adopting Mr Khoo's formulation that the "reasonable costs" be divided equally - amongst the defendants, but not the claimants as well. So it is the defendants who will bear the costs in the first instance of those further inspections but that is not, and I am going to ask counsel to come up with something that reflects this, to be regarded as finally deciding that those costs should be borne by the defendants.

16. For the avoidance of any doubt, when I said the blue and the green versions, I mean including the words in brackets, "Including inspection of the higher elevations provided these do not require rail operator consent". I can see from the draft directions provided to me that there is not universal agreement amongst the defendants that those words should be included but, in my view, they should be.

17. I am slightly surprised by the period suggested in correspondence for the obtaining of a BAPA presumably from Network Rail but if that is the period that Network Rail would require to provide that agreement, then it is, as they say, what it is. Previous experience tells me that there is, for good reason, quite a lot of to-ing and fro-ing, when such consent is sought, in assessing the risk to the railway, particularly in a built up area such as this. So it may be that that is, indeed, how long they require. If the consent can be obtained and that inspection facilitated, all the better, but I am certainly not requiring anyone to do so at this stage.

L A T E R

18. I am not going to make orders for a Scott Schedule in this case. The common situation in which a Scott Schedule is ordered, although certainly in no way limiting the utility of Scott Schedules, is where there are individual defects that can be set out by the claimants and responded to by the defendants. An issue can often arise as to whether the Scott Schedule in some way supersedes the statements of case formally pleaded.

19. In this case, firstly, as I observed and Mr Khoo has emphasised, there are no column headings proposed, but it appears that what is intended is not a Scott Schedule which would set out individual defects - which in this case would render it completely

unwieldy and unmanageable - but rather a document that identifies in broad terms what the alleged defect is said to be, or the alleged breach is said to be, in some locations in the building. The benefit, it is suggested, of taking that approach would be that when the defendants respond to that case, they will be able to include within the Scott Schedule a technical case following inspection of the buildings which is not currently apparent on the face of the Defences.

20. It seems to me, I am afraid, that that is the wrong way of going about it. If, once the inspections have been undertaken, the Defences require amendment, they should be amended, and if they are not amended, then the defendants will be stuck with what they have said in their Defences.

21. From the defendants' point of view, it is not the most efficient way to remedy that situation, if it arises, to have a freestanding and separate document in the Scott Schedule which replicates large parts of the Particulars of Claim, and then effectively requires the defendants to respond to those parts of the Particulars of Claim in terms of general defects, possibly repeating the case in the Defences and possible departing from the Defences. It seems to me that that document is likely to be duplicative and to incur unnecessary costs and/or to raise issues as to what the claimants' and defendants' cases truly are, and it will not ultimately be a useful working document for trial.

22. As a number of counsel have observed, the correlation, if you like, between the claimants' case on liability and the defendants' case on liability - and by liability I mean breaches causing defects - is likely to be addressed in the expert evidence and set out in an accessible form in any joint statement, and that would be a more useful document to the court for the purposes of the trial than would be a Scott Schedule. For all those reasons, I am not going to order Scott Schedules as shown in blue in the draft. So a line through all of that.

L A T E R

23. I will include the provision for supplementary statements. I emphasise that the fact that it is there is not to encourage them if they are not in fact necessary. They are not required, but they may be served. But to have that provision in already avoids the need to come back to the court and make any further applications in that respect. If supplementary statements are necessary, obviously they should in the normal way only respond to matters that have been brought in in other statements and not covered or new matters that have arisen.

L A T E R

24. The claimants contend that the defendants in their different groupings should all have permission to instruct only one expert jointly in the fields of fire engineering, architecture and quantum analysis. The defendants seek, in their various groupings, to instruct separate experts in respect of each one of those matters.

25. In relation to fire engineering and architecture, I am at least clear that the Willmott Dixon defendants and Amtrust should be entitled to instruct their own experts. Issues arise as to whether defects are ones of design or workmanship, which may be covered by the primary Chubb insurances and/or the Amtrust policy, and it seems to me

entirely appropriate for there to be distinct experts on those liability areas for those two groupings of defendants. I am less clear as to what the position should be as amongst the primary and excess layer defendants, that is defendants 8 through to 22. It is a considerable concern, as a matter of case management, that the court should be ordering, at least on the subject matters of fire engineering and architecture, another six experts all giving discrete and independent advice.

26. The two points which are most urged upon the court are, firstly, that there are potential conflicts amongst what I will call the insurance defendants in relation to the nature and causes of defects, and whether, therefore, they are caught by the relevant policies and notified under the relevant policies. The last of those points is not - I think it is now accepted - a matter of expert evidence, but the former is. The second matter most relied upon is that there is a real issue if - even though evidence is given by independent experts, if you will pardon the tautology, independently - one party wishes to engage with that expert to make more detailed enquiries as to the basis upon which a view has been expressed, because there may be different outcomes for those parties, depending on the engineering or architectural view, but the parties will be unable to do that if they have a single expert amongst them.

27. With some reluctance, simply because of the number of experts, I am persuaded that on those matters of fire engineering and architecture, the insurance defendants nonetheless ought to be entitled to call expert evidence within each of their groupings, and not a single expert for the three of them. The most important factor seems to me to be the fairness of enabling them to communicate on a privileged and confidential basis with the respective experts. As I indicated in the course of the argument, what troubles me in some of the submissions that have been made is that they seem to assume that an expert will be giving evidence in the interests of a particular party. That is plainly not right and must not be case. But the ability to discuss the evidence with the expert and interrogate the evidence and the views independently expressed from different points of view, does seem to me, sadly, to militate in favour of that multiplicity of experts.

28. In relation to the quantum analysis, I take a different view, and it seems to me that the insurance defendants should properly share a single expert. The sorts of issues that Mr Weitzman and Mr Hext in particular have identified as to why remedial works might be required, and, therefore, why there might be a conflict in respect of the liability evidence, ought not to arise when it comes purely to the question of quantum. Tempting though it might be to require the other defendants also then to join in with the same quantum analysis, it seems to me, given the slightly broader areas of dispute as between design and workmanship, and exclusions under the policy to which Mr Hilton has referred, that it would be appropriate for them to have their own experts. Should they change their minds and want to join in, there would be absolutely no objection to that.

L A T E R

29. I am going to make the order sought by Mr Khoo in this instance. The issues that may arise in relation to a Building Liability Order are at present undefined, and that is no criticism of anyone. It is simply the case that they are a relatively new matter and the issues that may arise are somewhat undefinable. But an issue is likely to be the financial conduct of the first defendant and the financial relationship between the first

defendant and the second to seventh defendants. It is right that, to a large extent, that ought to be the subject matter of publicly-available and disclosed documentation, and that expert evidence to navigate that material may be unnecessary. But it seems to me more likely that, despite the proliferation of experts in this case, the court will be assisted by forensic accounting expert evidence to find its way through the material and understand the points which either party wishes to make in that respect, and to that end I will make the order sought. Just in case we did not have enough experts already.

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