Neutral Citation Number: [2014] EWHC 1928 (QB)

Case No: HQ/13/1087

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 5 March 2014

BEFORE:

MRS JUSTICE ANDREWS DBE

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BETWEEN:

DANY LIONS LTD	Claimant
- and -	
BRISTOL CARS LTD	Defendant

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MR J CHEW (instructed by IBB Solicitors) appeared on behalf of the Claimant
MR O DRAPER (instructed by Pitmans LLP) appeared on behalf of the Defendant

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Judgment

Mrs Justice Andrews DBE:

1. This is an application made by the Defendant for permission to amend the Defence. The application notice was issued two days ago on 3 March 2014 and the application comes before me for determination today, which is the first day of trial. The explanation for the lateness of the proposed amendment which is given in the application form is as follows:

> "The proposed amendments arise out of: (a) the Claimant's disclosure; and (b) an exchange of correspondence shedding light on the relevant documents on 25 and 26 February 2013."

I was taken to that correspondence in the course of submissions by the Defendant's counsel Mr Draper.

2. It is alleged that the Defendant believes that the case put forward in the proposed amendments has a real prospect of success; indeed, that it provides strong grounds on which to strike out the claim as an abuse of process. It is therefore said that the Defendant would be seriously prejudiced if it is unable to pursue the argument that it now wishes to pursue under the amendment.

3. The Claimant strongly objects to the late amendment on a number of grounds. It alleges that it is being made at the last minute with no good reason for the delay; that the documents on which the Defendant relies have been available since last September, when they were disclosed in the Claimant's list; that the pleading is defective despite it being the second attempt at a draft pleading; that the Claimant would suffer prejudice if the amendment were allowed, (in particular in being unable to adduce further evidence itself, specifically evidence from a third party to which I will refer as JSW); and that the proposed amendment in so far as it is comprehensible has no real prospect of success.

4. There is no real dispute between counsel as to the legal principles that apply when one party seeks to make a late amendment. It is accepted that it is no longer good enough for such a party to argue that no prejudice has been suffered by his opponent save as to costs. One of the leading cases on late amendments is the decision of *Swain-Mason and others v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2735, a decision of the Court of Appeal . There are a number of guiding principles set out in Swain-Mason which are of assistance to the court in the present case.

5. First of all, the Court of Appeal endorsed the approach of Moore-Bick J., as he then was, upheld on appeal, in a pre- CPR Commercial Court case called Worldwide Corporation Ltd v GPT Ltd , of refusing late amendments which had been prompted not by discovery of some unsuspected evidence or fact but by a reappraisal by newly-instructed counsel of the merits of the case. Secondly, the Court of Appeal endorsed what it had said in Worldwide Corporation Ltd v GPT Ltd about the fact that the payment of the costs of an adjournment may not be adequate compensation for somebody who is keen (and I paraphrase) to have finality in the litigation which has been hanging over his head for some time, and which will not really compensate him totally for being, as the court then put it, "mucked around at the last moment".

6. Thirdly, the Court of Appeal said that the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other court users requires him to be able to pursue it. It is clear that the approach of the courts towards late amendments has been far less lenient than it was in the past, and that the obligation is upon the party seeking to make that amendment to satisfy the court that it is truly in the interests of justice that he should be allowed to raise the late case. In that context, the court in the case of Swain-Mason made it clear that it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment at which the amendment is made what the amended case is that he has to meet.

7. One also has to look at questions of late amendment in the light of the approach by the

Court of Appeal in the more recent case of *Mitchell v News Group* [2013] EWCA Civ 1537 to defaults in compliance with the Rules. Again, I paraphrase: nowadays, a much stricter view is taken of non- compliance. It was said in that case that if departures are to be tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue.

8. Turning to the new case that the Defendant is seeking to introduce, I remind myself that I have to carry out a balancing exercise. I have to consider what the prejudice will be to the Defendant if the Defendant is unable to raise this case, and I have to balance that against the prejudice to the Claimant if it is raised, and to the Claimant and to other court users if it would necessitate an adjournment. Mr Draper has very candidly made it clear that if I were minded to find that an adjournment would be the concomitant of allowing his client permission to amend, then the Defendant would seek to proceed on the unamended case. However, he submits that it is not a case in which I should have to adjourn if the application succeeds, because any prejudice to the Claimant is not such as would necessitate an adjournment. Indeed, he goes so far as to submit that there is no real prejudice to the Claimant at all, and certainly not such as would outweigh any prejudice caused to his clients by not allowing the amendment.

9. It is appropriate to start with what this case is all about. The background is that the Claimant and the Defendant entered into a contract for the Defendant to carry out certain works to the Claimant's classic car. The only witness of fact in this case is a Mr Olins who is a director of, and, as I understand it, effectively the man behind the Claimant company. He is a solicitor and a litigation partner in a firm called IBB Solicitors. Mr Olins has made two witness statements in this matter, the second of which has some bearing upon this application.

10. The case as originally pleaded relates to a settlement agreement that the parties entered into at a time after the Defendant had failed to carry out the work as agreed. The parties entered into negotiations with a view to trying to reach an amicable resolution of the matter without the need to resort to litigation. There was a settlement agreement, and the claim as currently put is premised on the fact that the condition precedent to that settlement agreement was never fulfilled.

11. The settlement was reduced to writing, and it provided as an express condition precedent that the Claimant would use reasonable endeavours to enter into an agreement with a third party, (that being JSW, to whom I have already referred) on or before 30 May 2012, to carry out "the Works". The Works were the works for which the Defendant had originally contracted, the works to the car. Various consequences would apply if the condition precedent were fulfilled. If it was not fulfilled, then the settlement agreement provided that *"the parties shall have the same rights and obligations relating to or otherwise in connection with the existing agreement which they had immediately before the making of this agreement"* . The deadline for fulfilling the condition precedent was extended, eventually to 19 January 2013.

12. The Claimant says that it performed its obligations under the condition precedent to the settlement agreement and it tried to negotiate a contract with JSW, but that in the event no such contract was entered into. It says that there were quotations for the Works, but the Claimant was unable to agree on a fixed price, or indeed any price, with JSW, and that therefore matters reverted to the position before the settlement agreement was entered into.

13. The currently pleaded Defence alleges that there was a breach of the reasonable endeavours obligation, in that there was a basis upon which a contract could and should have been entered into with JSW, and that the Claimant cannot rely upon its own breach. The material passage in the Defence which relates to the matters concerned is paragraph 29. Paragraph 29 is a response to paragraph 41 of the Particulars of Claim, and therefore in order to understand how the issues are presently formulated it is important to set out what was said in the Particulars of Claim. I will start with paragraph 39 of that pleading, because that puts paragraph 41 in context. Paragraph 39 alleges that on 16 November 2012 JSW wrote in an email to Mr Olins that:

> "A firm fixed price will be £195,000 plus VAT. We do expect the final bill to be less than this amount and you will of course only be billed for the actual costs that we incur. We should also mention …. that the total cost is unlikely to be contained within the £152,000 budget."

Paragraph 40 goes on to plead:

> "Accordingly JSW's price for the works inclusive of VAT was £258,000,"

and a breakdown of that figure is then given. Paragraph 41 says:

> "JSW's price for the works was £105,000 more than the price in the works contract, an increase of 69 per cent. Accordingly, the Claimant did not conclude a contract for the works with JSW. In any event, JSW did not ultimately offer a fixed price contract and this price was their best estimate, having assessed the car, having stripped it down."

It is to be noted that nowhere in the passage from which I have quoted, other than in the final sentence of paragraph 41, is the word "offer" mentioned. Paragraph 39 does not plead that the contents of the email of 16 November amounted to an offer to contract.

14. In response to that, it is pleaded in paragraph 27 of the Defence that what was pleaded in paragraph 39 of the Particulars of Claim is admitted, that is, the contents of the communication of 16 November. Paragraph 40, which is what the price was, is not admitted, and it is pleaded that in any event the ultimate agreement between the Claimant and JSW does not provide for a fixed price.

> "In the premises it is denied that JSW's quotation dated 16 November 2012 is of any relevance."

Then Paragraph 29 of the Defence says:

> "As to paragraph 41, paragraph 28 above is repeated. However, it is in any event denied that JSW's quotation dated 16 November 2012 was £105,000 more than the price in the works contract,"

and there are various reasons given for that, and it is stated:

> "In the premises it is denied there was any material discrepancy between the estimates provided by JSW and the Defendant."

Paragraph 41 is, in other words, not admitted.

15. The heart of the pleading is paragraph 31(3) in which it is pleaded that:

> "In breach of the settlement agreement the Claimant failed to use its reasonable endeavours to fulfil the condition precedent, *there was an offer in good faith by JSW to carry out the works for the Claimant* . As aforesaid, in the premises there was no or no material discrepancy in JSW's and the Defendant's projected costs of carrying out the works. The Claimant was not therefore at liberty, in the light of clause 2 of the settlement agreement, to reject JSW's offer. Alternatively, if contrary to the foregoing JSW's estimate did exceed that of the Defendant, the Claimant was not at the liberty in the light of clause 2 of the settlement agreement to reject it on that basis. The Claimant cannot take advantage of its own breach of contract to seek to recover more from the Defendant than would have been recoverable under the settlement agreement had it accepted JSW's offer." [emphasis added]

16. Mr Draper submitted that the only "offer" that could possibly have been referred to in paragraph 31(3) of the unamended Defence is a reference back to the 16 November communication, although that is described earlier in the same pleading as a quotation and not as an offer. I agree that that is probably the way in which one would have to construe the Defence, unsatisfactory though that may be.

17. The draft amendment proposes to raise a new claim which is, on the face of it, entirely inconsistent with the case that the Defence thus far has raised, and as I have quoted. It is a plea that in the further alternative the Claimant in fact <u>did</u> contract with JSW on or before 19 January 2013, and in doing so satisfied the condition precedent in the settlement agreement. Therefore, this claim is in breach of the settlement agreement and an abuse of process, and should be struck out. It is pleaded that the agreement between the Claimant and JSW was reached on or around 9 January 2013 and is contained in and/or evidenced by emails exchanged between Mr Olins and somebody called Dane Mills, who was an accountant working for JSW, on 7 January 2013 and 9 January 2013 which are attached to the proposed amended Defence.

18. So one has moved from a primary case that there has been non-compliance with the settlement agreement and a breach of its terms, to a case that there has been full compliance with the settlement agreement. However, Mr Draper submits, the end result is much the same, which is that the claim must fail for one reason or the other, either

because there has been a breach and the party in breach cannot take advantage of its own breach in order to claim damages, or alternatively because there has been complete fulfilment of the contract and the party that has fulfilled the settlement agreement is bound by that agreement and cannot revive the other agreement which was the subject of the settlement, on standard principles.

19. I can see that, although at first blush the two contentions are diametrically opposed, in theory it might be possible to run them as alternatives on the basis that Mr Draper has suggested. Mr Draper specifically urges on the court the fact that his new alternative case is dependent on a question of construction of a handful of documents. Whilst he accepts that those documents were disclosed as far back as last September, he says that it was in the light of recent communications between the solicitors that it became apparent that the construction that he is now seeking to put upon them was open to the Defendant, because it was only in the light of clarification as to what other documents, if any, might be available that it was possible to come to the conclusion that one could put that construction on the exchanges. It is necessary to turn to those exchanges in order to evaluate that explanation.

20. The start of the chain of correspondence is the document of 19 November 2013 to which I have already referred, and which is quoted verbatim in the pleadings. One then picks up the story on 7 January 2013 when Mr Mills, the accountant, sent an email to Mr Olins wishing him a Happy New Year and saying this:

> "Jim [Jim Stokes, the owner of JSW] has asked me to inform you that a window has opened up in the engine shop that will allow us to start work on the engine of the Bristol 405. Unless we hear from you to the contrary, we propose to commence work in the next day or so. We trust that this meets with your approval."

21. Mr Olins responded to that by email, stating that the contractual relationship between his company and the Defendant did not come to an end until 19 January. He then said this:

> "Until then DLL, [that is the Claimant] cannot enter into a formal agreement for the restoration works with JSW. To do so would prejudice DLL's position against BCL [that is the Defendant]. However, if the particular works that you have in mind can properly be categorised as works designed to get a better estimate about the overall cost of the restoration works, I suspect that they should not present a problem. I will, however, need to take advice from my colleague Paul Kite,"

He then asked them to confirm the hourly rate for the restoration works, how materials would be charged, and whether or not JSW would be reasonably confident of completing the works by, say, the end of September.

22. The response to that, on 9 January, was again sent by Mr Mills. It was copied, amongst others, to Mr Stokes. It said:

> "Apologies for the delay. The work can certainly be categorised as works designed to get a better estimate about the overall cost of the restoration works as we will in the first instance be stripping the engine down and appraising what we find,"

Mr Mills then answered the questions about the charge out rate, the materials and the duration of the project. Finally, on 9 January, Mr Olins responded to Mr Mills, again copying in Mr Stokes:

> "On the understanding that the works you carry out will be limited to stripping the engine down to ascertain what restoration works to the engine are needed, I am happy for you to proceed."

23. Mr Draper submitted that on the true construction of those exchanges, the works that were the subject matter of the 7 January email could only have been the full Works that had been the subject matter of earlier negotiations and which were the subject matter of the contract with his client. He submitted that effectively this was a resurrection of an offer which he says was made back in November in the earlier email to do those Works for a particular sum, although he categorises the sum that was mentioned in the November email as a ceiling on the amount, rather than a fixed price. He contends that, properly construed, Mr Olins' final email was an acceptance of that offer on 9 January, making it clear that he was accepting an offer for the whole of the Works but that limited work was to be carried out in the first instance. In other words, the Defendant's contention is that the references to stripping the engine down were really about the first stage of the Works, and that on an objective construction it is possible at least to raise a reasonable argument that a contract was made for the whole of the Works at that stage.

24. There are a number of problems with that approach, not least the fact that it is quite clear from earlier communications by Mr Olins with JSW, which I have seen, that Mr Olins was very wary of the prospect of entering into any form of informal, unrecorded contract with anyone in the light of his previous experience with the Defendant, who, having entered into a contract with his company, had by then denied that there was any binding agreement between them. There was a formal draft agreement in circulation between the Claimant and JSW, and there was a reference by Mr Olins in correspondence pertaining to that draft to having got one's fingers burnt before. In the light of that, the reference in the email that was sent in response to what was said to be the revived offer, to the company not being able to enter into a formal agreement for the restoration works with JSW, must be taken to being a reference to not being able to enter into a written agreement, which was what the parties had in contemplation was what would happen – all of the other communications being effectively "subject to contract" on the basis of what in principle might be agreed before that written contract was entered into.

25. The second obstacle to that conclusion is the fact that Mr Stokes, who, as I have mentioned, was effectively the man behind JSW, had entered into some discussions with both of the parties in this case at a tripartite meeting at his workshop in December, that is after the so-called offer in November but before its alleged acceptance in January. The 17 December meeting is referred to in Mr Olins' second witness statement, and he says that most of the meeting was taken up by Jim Stokes explaining and justifying to both the parties JSW's pricing. He says:

> "At my request Jim clarified JSW's email of 16 November. He said that the email was not intended to be a formal offer to enter into a fixed price contract. Indeed, Jim made plain that JSW was not willing to enter into a fixed price contract. He was anxious that I should understand that the figure of £195,000 plus VAT mentioned in the email was JSW's considered view of the likely price for the modified works. He could not rule out the actual price being significantly higher."

In the light of what Mr Stokes is said to have said to both parties' representatives at a meeting in December, it seems to me to be wholly unarguable that the party to whom the supposed offer was directed, that is the Claimant, could have understood that Mr Mills, on 7 January, was reviving an offer for a fixed price (or capped) contract that had been made in November, let alone that it could have accepted such an offer, given that Mr Stokes had made it very clear to the Claimant that that was not what he intended.

26. I do take the point, of course, that Mr Mills was the author of both the emails, but Mr Stokes was copied in to them. It would have been, at the very least, a potential basis for claiming that there was a unilateral mistake of which the Claimant had taken unfair advantage, if the Claimant were to turn around at a later stage and say that it had accepted the offer that was allegedly revived in January, in the light of what Mr Stokes had said. There is no evidence before me that that is <u>not</u> what Mr Stokes said. The Defendant adduced no evidence on the point.

27. So there are real problems with the case sought to be introduced in the proposed amended pleading, but the problems do not stop there. If one simply looks at these documents on an objective basis, with the best will in the world, they cannot reasonably be construed as an acceptance of an offer by JSW to do the whole Works. On the contrary, Mr Olins is making it pretty clear that the only thing he is prepared to agree to at this stage is stripping down the engine to ascertain the extent of the restoration works that would be needed, and that is the absolute limit of what he is prepared to allow JSW to do, and the sum total of what he is prepared to allow JSW to charge the Claimant for.

28. The proposed amended Defence suffers from a number of pleading deficiencies, not least that it does not spell out what the terms of the alleged contract with JSW were, or how it is supposed to have been arrived at. Frankly, one is scrabbling around to find out what it is alleged the terms of the offer were. Without Mr Draper's explanation to me of how the new paragraph 31(4) worked, by reference back to the Particulars of Claim and to a passage in it that Mr Chew said did not bear the construction that Mr Draper put on it, I would have been left in some bemusement. But that is not the main reason why I am going to refuse this application.

29. It is incumbent upon the party seeking the indulgence of the court to raise a late claim to come up with a good explanation of why it is raised at the last minute. No such explanation has been forthcoming. The Defendant's legal representatives have had the documents for some six months and were always in a position to be able to make out this case. I take into consideration, of course, the fact that the prejudice to the Claimant that is said to arise may not be quite as great as Mr Chew suggests it is. Admittedly, if this matter had come to light earlier it may have been possible for either party to have sought disclosure from JSW of internal documentation which might go to support or undermine

the case that a contract was made, but at the end of the day the task of the court is to determine in the light of the factual matrix whether the exchange of correspondence relied on, objectively construed, does or does not give rise to a contract. The absence of such further evidence is of no great significance.

30. I am deliberately saying nothing about the question of whether or not the 16th November communication amounts to an offer, because I am conscious of the fact that that is one of the issues I will have to try in due course, so for present purposes I am prepared to accept that it does contain an offer and to put the Defendant's case at its absolute highest. But it does seem to me that there is no reasonable basis for an argument that that "offer" was accepted in the communications that were relied on.

31. That, plus the lateness, it seems to me, are enough in and of themselves to dispose of this application in the Claimant's favour.

32. For all of those reasons, despite the valiant attempts of Mr Draper to persuade me to the contrary, I am going to refuse this application for permission to amend.