



Neutral Citation Number: [2017] EWHC 275 (TCC)

Case No: HT-2016-000270

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2017

Before :

MRS JUSTICE O'FARRELL DBE

Between :

TRIUVA	<u>Claimant</u>
KAPITALVERWALTUNGSGESELLSCHAFT	
- and -	
GALLIFORD TRY CONSTRUCTION LIMITED	<u>Defendant</u>
-and-	
ALUMET SYSTEMS (UK) LIMITED	<u>Third Party</u>

Mr Robert Clay (instructed by **Anthony Collins Solicitors LLP**) for the **Claimant**
Mr Piers Stansfield QC and **Mr Crispin Winser** (instructed by **Pinsent Masons LLP**) for the
Defendant
Ms Clare Dixon (instructed by **RPC**) for the **Third Party**

Hearing dates: 10 February 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell :

1. This is an application by the claimant (“Triuva”) for an interim payment pursuant to Part 25 of the Civil Procedure Rules in respect of its claim for damages against the defendant (“GTC”). The defendant opposes the application on the ground that the court can’t be satisfied that if the matter went to trial, Triuva would obtain judgment for a substantial amount of money. If, and to the extent that the claimant succeeds, GTC seeks to pass on the application to the third party (“Alumet”).
2. The dispute between the parties arises out of the development of a ten-storey office building with glass and aluminium curtain wall facades at 134-138 Edmund Street, Birmingham (“the Property”).
3. By a contract dated 4 March 2004, between KUC Properties Ltd (not a party to these proceedings) and GTC (then known by a different name), GTC agreed to carry out the design and construction of the Property.
4. GTC engaged Alumet as a sub-contractor for the design and installation of the glazing, curtain walling and cladding works for the Property.
5. The works were completed in about 2005. By a contract in writing dated 22 September 2005, executed as a deed, GTC provided a warranty to Triuva in respect of its works. By a contract in writing dated 20 April 2007, executed as a deed, Alumet provided a sub-contractor warranty in favour of Triuva.
6. From about 2012, the Property suffered from water ingress. Triuva procured investigations and carried out remedial works, which are ongoing.
7. On 14 October 2016 Triuva commenced proceedings against GTC, seeking damages in respect of alleged defects in the glazing, curtain walling and cladding works caused by breaches of the warranty. On 22 November 2016 GTC issued an Additional Claim against Alumet, seeking an indemnity or contribution in respect of Triuva’s claim.
8. On 22 December 2016 Triuva issued this application for an interim payment against GTC in the sum of £1,250,819.37. On 6 January 2017 GTC issued its application for an equivalent interim payment against Alumet.

Test to be applied

9. CPR 25.1(1)(k) empowers the court to grant an order for an interim payment by a defendant in respect of damages which the court may hold the defendant liable to pay.
10. CPR 25.7(1) provides that the court may only make an order for an interim payment where specified conditions are satisfied, including (c):

“it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment ...”
11. CPR 25.7(4) provides that the court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

12. The court must be satisfied on the balance of probabilities that if the claim went to trial on the basis of the evidence currently before the court, the claimant would obtain judgment for a substantial amount of money; it is not sufficient for the claimant merely to show that it is likely that it will do so: *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] EWCA Civ 57 per Aikens LJ at Paras. 36 & 38.
13. Whether the amount of money is substantial or negligible must be determined in the context of the total claim made: *Test Claimants v Inland Revenue* (above) per Aikens LJ at Para. 39.
14. The court should not conduct a mini trial, and an application for interim payment is not appropriate where the issues of fact and/or law are complex, but the application may be entertained if the claimant can establish that it would succeed on an “irreducible minimum part” of the claim: *Schott Kem Ltd v Bentley* [1991] QB 61 per Neill LJ at pp.71-73; *Trebor Bassett Holdings Limited v ADT Fire and Security plc* [2012] EWHC 3365 per Coulson J at Paras.8 – 10.
15. The issues that the court is required to determine on this application are:
 - i) whether the court is satisfied that Triuva would obtain judgment on at least part of its claim for damages;
 - ii) if so, whether the court is satisfied that Triuva would be awarded substantial damages in respect of the claim;
 - iii) whether the court should exercise its discretion and order an interim payment;
 - iv) if so, what level of interim payment should be ordered; and
 - v) whether the same or any similar order should be made against Alumet.

The Claimant's Evidence

16. Triuva's pleaded case alleges numerous defects in the Property but this application is based on the following categories of defect to which it claims there is no defence:
 - i) water ingress to the structurally glazed system and the pressure plate and cap system;
 - ii) inadequate fire stopping;
 - iii) incorrectly fire-rated alucobond panels;
 - iv) structural defects; and
 - v) inadequate thermal performance.
17. Reliance is placed on a number of reports produced by Buro Happold, a façade engineer, engaged by Triuva to investigate the causes of the defects. In October 2012 Buro Happold produced a report identifying water ingress through the glazing systems and the potential causes of the same. Following intrusive inspections carried

out jointly with GTC and Alumet, in July 2014 Buro Happold produced a further report, recording defects identified by the inspections. On 10 October 2014 Buro Happold produced a report setting out its recommendations for remedial works. In 2016 Buro Happold produced further reports, recording defects found during the remedial works carried out by Clear Line Maintenance Limited.

18. In December 2015 a hose test was carried out in the presence of GTC, which demonstrated that there was water ingress into the Property.
19. Buro Happold has expressed its opinion that defects are present in the glazed cladding systems, including the following.
 - i) Water ingress has been caused by the following defects, which are contrary to the Alumet drawings:
 - a) absence or incorrect installation of the EPDM membrane and missing clip and sealant so as to provide a vapour barrier in the pressure plate and cap system;
 - b) defects in the gaskets, seals, and the spacing of fixings and toggles so as to hold the glass firmly in place;
 - c) incorrect position of the deflector block and/or blockage of the drainage holes preventing water drainage; and
 - d) absence of the concertina membrane in the structural glazing system and defective mastic.
 - ii) The fire stopping at the floor slab compartment lines is not as shown on the Alumet drawings in that there are gaps and the fire stopping is not adequately compressed.
 - iii) The Alucobond flashing panels are Class 1 instead of Class 0 for surface spread of flame and therefore not in accordance with the relevant Building Regulations (Part B 2000).
 - iv) There are structural defects in that the fixings on the panels are badly installed (slotted holes wrong size or orientation for bolts, screws not properly fixed) and no anti-rotation pins have been installed.
 - v) Insulation is missing or discontinuous, contrary to the Alumet drawings, resulting in cold bridging.
20. Triuva's case is that it has spent c. £1.3 million to date on remedial works and professional fees and that its forecasted costs are over £2 million (£1.7 million on remedial costs plus professional fees). The claim for an interim payment is based on the costs incurred in investigating and rectifying the above defects, as set out in the witness statement of David Berrisford of Poole Dick Associates, the contract administrator and cost consultant for the remedial works contract:

a	Preliminaries for the 12 week original remedial works programme	£150,980
b	Hose testing the cladding system	£1,225
c	Original survey, inspections and benchmarking by Clear Line	£93,150
d	Extended survey by Clear Line	£105,159
e	Making good fire stopping defects	£34,838
f	Replacement of incorrectly fire-rated Alucobond panels	£577,940
g	Replacement of defective pressed metal copings	£161,666
h	Making good the structural integrity defects	£108,355
i	Making good defects to the deflector blocks and blocked drainage holes	£5,355
J	Remedying defects in the EPDM membrane	£12,150
		£1,250,818

Defendant's Evidence

21. GTC's case (supported by Alumet) is that Triuva has provided inadequate particulars of the defects alleged and has failed to support its case with independent expert evidence from an architect or building surveyor. Reliance is placed on the initial report of Simon Murray, chartered architect of William J Marshall & Partners. Mr Murray has not yet reached a firm conclusion in respect of the alleged defects but the following points are made in his report.

- i) There is insufficient clarity as to the technical literature, standard details or advice from Schüco (the proprietor of the glazing systems) applicable to the weatherproofing issues.
- ii) Mr Murray does not address the gaps in the fire stopping.
- iii) The adequacy of the use of the Alucobond panels depends on the approach of Building Control. The approved documents provide practical guidance for the purpose of the relevant Building Regulations but they are not mandatory and there may be alternative ways of achieving compliance.
- iv) There is insufficient clarity as to the technical literature, standard details or advice from Schüco applicable to the fixings and anti-rotation pins. A structural assessment is required as to the adequacy of the same.
- v) The degree of insufficiency and non-compliance, and the consequences of any shortfall in the insulation require clarification and further investigation.

22. There is no pleaded case on quantum, other than a claim for the costs of investigation and remedial works. GTC relies on the quantum expert report of George Taft of Navigant. Mr Taft is critical of the procurement and tender process for the remedial works. His opinion is that it is likely that an unreasonably high price was and is being paid for the works. The cost of the remedial works has increased from £424,932 to c. £1.7 million. There is no evidence of controls being in place to ensure that the extent of the remedial works is necessary, or to monitor the preliminaries resources claimed. It is unlikely that the claimed level of variation works could have been undertaken between 14 November 2016 and the date of the application as alleged. The professional fees claimed are unreasonably high.
23. GTC's case is that the application is premature. On the available evidence it is not apparent that the defects were sufficiently serious or widespread to justify the remedial scheme implemented. The reasonableness of the quantum claim is disputed and no account has been made for betterment. As a result, Triuva is not able to satisfy the court that it would be entitled to judgment for substantial damages.

Liability

24. I am satisfied that on the evidence before the court, there is no defence to the allegations in respect of (i) water ingress, (ii) fire stopping, (iv) defective fixings and missing anti-rotation pins and (v) inadequate thermal insulation. These defects have been identified with sufficient particularity in the pleadings and the Buro Happold reports, including non-compliance with the Alumet drawings. The letter of claim was issued in May 2013. Since then, GTC has had opportunities to inspect the Property, respond to the findings and views in the Buro Happold reports and comment on the remedial proposals. Although this application was issued without warning, and the defect record analysis was not issued to GTC until 6 December 2016, there has been sufficient time for GTC to examine the allegations so as to determine whether it has a liability defence to each category of defect. It is not sufficient for GTC simply to point to further investigations that it wishes to carry out. It is incumbent on a respondent to an application for interim payment to provide details of the case that it relies on as giving it a real prospect of successfully defending the claim.
25. The deed of collateral warranty appears to impose an obligation on GTC in respect of the design and construction of the Property. The relevant terms and conditions are admitted. Triuva is put to proof that it is the same legal entity as the beneficiary to the collateral warranty, Oppenheim Immobilien Kapitalanlagegesellschaft MbH, but Mr Binnie's third statement sets out the proof of name change provided to GTC and there is no challenge to that evidence. No other contractual or legal defence has been pleaded or argued that would exonerate GTC from liability for any proven defects.
26. GTC has established a triable issue in relation to allegation (iii) the Alucobond panels. The fire-rating allegation has not been pleaded. In any event, it is reasonably arguable that the fire-rating of the panels is compliant with the relevant Building Regulations. That is not a matter that the court can determine without the benefit of factual and expert evidence, and full argument.
27. For the above reasons, I am satisfied that if this matter were to be tried on the evidence currently available, Triuva would obtain judgment on at least part of its claim for damages.

Damages

28. There is persuasive evidence in the Buro Happold reports that the defects were sufficiently serious and widespread to justify destructive investigation and remedial works. The Property has suffered water ingress since 2012. Mr Berrisford has quantified the remedial costs associated with the identified defects, including the preliminaries and costs of surveys. Excluding:
- i) item f) the cost of replacement of the Alucobond panels (on the ground that the relevant defect is not pleaded and there is an arguable defence) and
 - ii) item g) the cost of replacement of the pressed metal copings (on the ground that they are not relied on for the purpose of this application),
- the claimed cost of and associated with the established defects is £511,212.
29. The starting point for the measure of damages for defective work is the cost of reinstatement. Triuva is only entitled to the reasonable costs of reasonable remedial works but, having carried out substantial works, it is for GTC to show that there has been any failure to mitigate its loss.
30. The criticisms made by Mr Taft are general in relation to the procurement approach and cost control. He has commented on each of the interim payment claim items in Appendix 4 to his report but he has not put forward an alternative quantum figure.
- i) In respect of item a) preliminaries (£150,980), he has expressed his opinion that the time-related preliminary items should not significantly exceed £100,000.
 - ii) In respect of item b) original survey (£93,150), he notes that this is the same as the contract sum allowance but that he needs to verify that this was carried out.
 - iii) In respect of item c) extended survey (£105,159), he notes that this was a lump sum quoted by Clear Line but would require further details.
 - iv) In respect of item h) structural remedial works (£108,355) and the other discrete items (c.£53,000), he has provided his breakdown of the costs and identified costs that appear to be duplicated or for which no explanation has been provided.
31. It is not appropriate for the court to embark on a line by line analysis of each element of the costs claimed for the purpose of this application. That is a matter for the trial. However, the court has to assess the weight of the evidence in order to determine whether Triuva can establish that it would succeed on its claim for damages if the matter were to be determined on that evidence.
32. From Mr Taft's report, it is clear that there are issues as to the quantum of the claim which can only be determined at trial. However, it is not in dispute that investigation and remedial works have been carried out and costs incurred under the remedial contract with Clear Line as set out in Mr Berrisford's evidence. No specific issues of betterment have been identified beyond the age of the building but that alone would

not justify any credit for betterment if the remedial works were the appropriate solution to prevent water ingress and make the building safe.

33. On that basis, the court is satisfied that Triuva would be awarded substantial damages in respect of the parts of the claim to which there is no defence.

Discretion

34. If the court is satisfied that the conditions in CPR 25.7(1)(c) have been fulfilled, then the court should order an interim payment to be made unless there is a sufficient specific reason not to do so: *Test Claimants v Inland Revenue* (above) per Aikens LJ at Para.47.
35. I have considered whether the court should exercise its discretion and order an interim payment in a defects case that is factually and technically complex, the determination of which will require expert evidence on issues of liability and quantum at trial. However, on the evidence before the court, I am satisfied that Triuva has established an irreducible minimum amount of damages to which it would be entitled. On that basis, it is appropriate for an interim payment to be ordered.

Amount of Interim Payment

36. The level of the interim payment should be a reasonable proportion of the likely amount of the final judgment. In the absence of any alternative quantum figure from GTC but taking into account the points raised by Mr Taft in his report, it is likely that Triuva would obtain judgment for £430,000 against the sum of £511,212 claimed. A reasonable proportion of that likely judgment sum for the purpose of the interim payment is £300,000.

GTC's claim against Alumet

37. It is not disputed that GTC engaged Alumet under a sub-contract for the design and installation of the glazing, curtain walling and cladding works at the Property. No issue has been identified in respect of the relevant sub-contract provisions relied on by GTC in support of its claim for an indemnity. GTC's case is that if GTC were liable to Triuva for the defects, then Alumet would also be liable to Triuva in respect of the same damage. Accordingly, to the extent that Triuva's application against GTC succeeds, it seeks the same remedy against Alumet.
38. Alumet relies on the points raised by GTC in opposition to Triuva's application. In addition, it submits that even if an order is made against GTC, the court should not make a similar order against Alumet.
39. Firstly, it submits that Alumet has not yet provided a substantive response to GTC's claim and the pre-action protocol process has not been completed. However, Alumet was involved in the joint inspections in 2014, GTC sent it copies of the Buro Happold reports and the letter of claim was sent by GTC on 31 August 2016. Therefore, it has had at least 5 months to consider the allegations and identify any defence.
40. Secondly, Alumet submits that there has been a shift in emphasis from the glazing panels to the glazing system forming the cladding. However, GTC sent Alumet copies

of the Buro Happold reports which set out the defects relied on in this application and further copies were supplied with the letter of claim. Therefore, Alumet had a reasonable opportunity to consider and respond to the allegations.

41. Thirdly, Alumet submits that the application against it was not issued by GTC until 6 January 2016. However, it has had over one month to prepare its evidence in response and it has not sought an adjournment of the application.
42. Therefore, it would be appropriate to order an interim payment to be made against Alumet in the same terms as the order against GTC.

Conclusion

43. For the reasons set out above, it is ordered that:
 - i) GTC shall pay to Triuva the sum of £300,000 by way of interim payment on account of any damages which the court may hold GTC liable to pay by 5 pm on 3 March 2017.
 - ii) Alumet shall pay to GTC the sum of £300,000 by way of interim payment on account of any damages which the court may hold Alumet liable to pay by 5 pm on 3 March 2017.
 - iii) The fact and amount of the interim payments must not be disclosed to the trial judge until all questions of liability and quantum have been determined.
44. I will deal with costs following consideration of any further submissions from the parties.