IN THE HIGH COURT OF JUSTICE No. HT-2018-000175

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice

Wednesday, 3 October 2018

[2018] EWHC 3926 (TCC)

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

BAM GLORY MILL LIMITED Claimant

- and -

(1) BALICREST LIMITED

(2) McGEE CIVIL ENGINEERING LIMITED Defendant

MR D. GOODKIN (instructed by IBB Solicitors) appeared on behalf of the Claimant.

MS C. PIERCY (instructed by Birketts LLP) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE WAKSMAN:

1 I have before me an application which, in its original form when issued on 13 September, sought, first, the striking out of the particulars of claim on the grounds that there was no reasonable ground for bringing them and/or they were abusive, and/or they fell within the court's inherent jurisdiction to strike, or, in the alternative, an order for service of a response to the defendant's request for further information which had been served on 24 August as to which there had been no response at the time of the making of the application. Consequential upon that, the time for filing and serving a defence would be extended to 28 days from service of a response to the request for further information.

2 The claims are made to enforce deeds of collateral warranty made by both Defendants.

3 Matters have moved on in this way (it now being 3 October). On 28 September, that is last Friday, the claimant served a substantial response to the request for further information with hundreds of pages of appendices. The claimant's overall position was that as the strikeout was made in the absence of any response and had as its alternative, an order that the further information be provided, now that that further information has been provided there is no basis for striking out and any lingering concerns about the adequacy of the further information would not justify the dismissal of the claim.

4 The legal teams were clearly at some cross-purposes in this regard because Ms Piercy submitted a very detailed skeleton argument which contended principally that the claim should still be struck out and was not saved by the further information. In that skeleton argument, she raised for the first time an additional point that the claims (save for that in respect of the second deed made by the Second Defendant) were irretrievably time-barred at the time when they were issued and that was an additional reason to strike them out. She accepted that was a new point and I indicated I was not prepared to deal with it today. There may be an answer to it as briefly enunciated by Mr Goodkin, but if the point is to be pursued, it will have to be by way of a further application if this case continues.

5 The claim on any view was brought and issued in a hurry. The reason for that is clear. The relevant deeds of collateral warranty given by these two defendants to the claimant, who was the successor in title to the original beneficiary of the collateral warranties, were made by deed and therefore any time period under the Limitation Act 1980 was for twelve years. However, there was a longstop date in those deeds which provided for an expiry in any event by 24 June 2006; that is apart from the second deed of McGee Limited. So that limitation is there for the first deed which was executed by the first defendant, Balicrest, and the first deed executed by the second defendant McGee Limited.

6 As the longstop date was 24 June, time was running up against the claimant in this year. It clearly had not spent much time considering the claim in the 16 years that had followed since the first works were done or the eleven years that had followed since the second work was done, although it only acquired the title, it is fair to say, in 2006 because the first intimation of a claim came forward only on 4 June and that was in purported compliance with the pre-action protocol. Perhaps understandably, there was not full compliance with that pre-action protocol but merely the setting out of what the general features of the claim should be.

7 The core of the claim is that the first defendant had expressly promised in the collateral warranty that it would have removed all obstructions and underground structures present within the site in question. The first defendant is a demolition contractor and it is an associated company of the second defendant which describes itself as a civil engineering company, both defendants being represented now by the same legal team. The allegation against the second defendant was the same thing, the failure to remove obstructions. The basis for that was a

little less clear given that the principle role of the second defendant was as a remediation contractor, so effectively being responsible for the removal of contamination on the site.

8 Before the claim was issued, the key point being made was that there was a plan which had been drawn up in 2016 which revealed a number of boreholes and trial pits which were identified on the plan served before the action was commenced on the other side and which, inferentially, it was being said had revealed some form of obstruction and structures beneath them and they were the structures essentially complained of. The problem that the defendant realistically faced, as opposed to problems which were perhaps less realistic to complain about, was very clearly set out by an email from the person who should know, Mr McGee who runs both companies, on 11 June. He said:

> "The drawing is obviously a trial pit/borehole location plan which is meaningless. Can you confirm back to me which of the two situations is applicable? Is it a set of locations that you want to do for trial pits or boreholes, i.e. they were merely intended, or a plan of trial pits/boreholes of recent investigations? It turned out to be the latter. If this is true, you will need to send me the results of the trial pits and boreholes for me to ascertain what the problem, if any, may be. At the moment, what you have given me does not supply any evidence of breach of my contract."

9 The particulars of claim need to be examined with some care. The particulars of claim came later as they were entitled to be served on 7 August. Paragraph 3 recites the first defendant's deed whereby it agreed it had:

> "...the obligation in good and workmanlike manner to demolish all buildings and importantly remove all underground structures, services obstructions, foundations, and tanks at the site."

Then there was an obligation to come back if the claimant had found such obstructions.

10 Then the second defendant's responsibility, pursuant to the first McGee deed, was also 2006 and it promised that it:

> "...designed and executed the works relating to the adopted drains, associated infrastructure, and site remediation in a good and workmanlike manner."

11 Then there was a second deed in October 2007 covenanting that it had executed the works relating to the further remediation in the sale contract dated 2 August 2006, which I infer may have been the contract between the previous owner and the current claimant.

12 Then paragraph 10 pleads that its limited investigations had revealed to the claimant that there were underground structures and obstructions which should have been removed by the first defendant carrying out the Balicrest works, or the second defendant in carrying out the first McGee works but which had not been removed, and that the location was shown on the plan. That is a fair statement of its case if one infers that the location of the structures were where the trial pits and boreholes were on the assumption that those boreholes and those trial pits, when dug, had revealed the obstructions. It reserved its position in paragraph 12 to say that it believed there were other underground structures which should have been removed by one or other but which were not discovered in its limited investigations, and then it intended to adduce expert evidence to identify the location of all of them and the costs that will need to be incurred in removing of them.

13 Paragraph 15 again refers to the structures which the first or the second defendant should have removed; then it is said that the claimant is entitled to claim against the first defendant damages for the breach of its contract and against the second defendant for damages against breach of its contract. On any view, there were claims for damages being against both of them but there was no breakdown of the responsibility unless it was to be said that the case was that they were both responsible conterminously for the failure to remove all of the obstructions.

14 The course taken by the defendants' legal teams was not surprising which was that those particulars of claim cried out for particularisation and that they should be provided quickly. I understand that because from the defendants' point of view, the claimant had had a very long time indeed to investigate these matters and to provide more detail, and, in particular, which are the obstructions that they rely upon in total and where are they, because as the particulars of claim made clear, the reliance on the plan was not said to be an exhaustive statement of the claimant's case. The defendants therefore pushed for the response and threatened to strike out the claim if there was not an adequate response by a particular date. As I say, that response came on 28 September.

15 The response has not satisfied the defendants and the defendants today maintain their strikeout application on the basis that the claim is still so defective that it should be struck out either on the grounds of a lack of particularity or on the grounds that this is a case which is analogous to the decision in the well-known case of *Nomura International Plc v Granada Group Ltd & Ors* [2007] EWHC 642 (Comm) where there was a lack of clarity or a lack of certainty as to whether the claimant really wanted to bring the claim at all and really, at the time of the claim, had no proper basis for doing so and knew that.

16 I will deal with those points in due course. However, in argument, the issues have been helpfully reduced and both counsel have addressed me on three key points which I can describe as 'what', 'where', and 'who'. The first question, now having regard to the response, is whether the obstructions have been sufficiently identified in terms of what they are. To cut a long-pleaded story short, I am of the view that the obstructions relied upon have now properly been identified. They include the results of the trial holes, and the boreholes and trial pits shown in the plan, but are referred to considerably more. In total, there are, I think, some 72 items. They are drawn from essentially two reports. One was a report commissioned in 2006 which, of course, was before the later McGee works in 2007. The other works had all been done in 2002 and 2003.

17 A point is made that reliance on that report is misconceived because it had led to the further works carried out by McGee in 2007 and therefore one can assume that the defects identified in the LBH report were no longer present. That is not a strike-out point. There may be something in it as an evidential point later on but if the claimant wishes to say that they were obstructions identified in the LBH report which, on its case, have still not been dealt with notwithstanding the 2007 works, it is entitled to make that case. Whether it succeeds is another matter.

18 The later report carries no such difficulties because it was produced in 2016. At page 18 of the further information, each item is cross-referenced to a trial pit or borehole by number. The location of the trial pits and the boreholes is not stated in the body of the further information but it is contained in plans which are appended to the reports to which they relate. So it cannot be said that location is now in issue, at least for present purposes.

19 Then the particulars of the instructions are given and, in each case, there is an extract from the report. A number of items refer to something called "made ground" as opposed to, for example, a piece of concrete. Ms Piercy said that that is hopeless because made ground cannot be a structure or an obstruction. Again, that is a matter of evidence. The claimant's case is that it is and when one looks at the details of the main ground given, we see that some of them are concrete and some of them are brick, or flint, or cobalt, and this court is not in a position to rule out that allegation on the basis that it cannot, on a proper construction of the documents, constitute an obstruction or a structure. Therefore, it seems to me that the core questions of what and where, which is what Mr McGee was understandably on about, have now been answered in the table which is to be found between pages 18 and 29 of the further information.

20 In relation to that, Ms Piercy made a separate point which is that while one could see how that case could be made within the express obligations of the Balicrest deed, that was far from clear so far as the McGee deeds were concerned which were essentially obligations to

remediate by, among other things, removing contamination and swathes of the underlying contracts were referred to in the further information.

21 The claimant's case on this only really emerged in the course of argument. I had interpreted the further information as stated (see answer 18) that the claimant's case is that the obligation to remediate or to decontaminate on a proper reading of the contracts would have included an obligation to remove the underlying structures and obstructions and therefore there was a basis for saying that the second defendant was liable. That might be an ambitious case but, on its own, it cannot be accused of a lack of particularity in the sense of what the shape of that case is going to be. However, Mr Goodkin attempted to argue that, in fact, there was a further limb as far as the second defendant was concerned which was that there were other items of contamination not contained in a table but which had been complained about in the reports and which were also the subject of the claim. As I indicated in argument, I do not accept that.

22 There is no pleaded breach of either defendant's duties by reference to anything other than structures and obstructions whether that duty arose by reference to demolition or whether it arose by reference to decontamination. In fact, when one looked at the underlying report, the amount of contamination which was not in the form of structures or obstructions seemed to me to be very little indeed and I question whether, in fact, there would have been a case for breach of duty in relation to contamination other than the matters referred to in the table in any event. However, in order to give clarity, it will have to be recorded in any event in any order I make that the claimant's claim is restricted in terms of the items complained of to those in the table in request for further information. If they want to allege that there are some other items to be complained of, apart from identifying them, that will require amendment and it will require an amendment in circumstances where, on any view, limitation has now expired with all the problems that that will bring. That is a matter that the claimant will need to give careful thought to going forward. So, subject to that qualification, the questions of 'where' and 'what' have been answered and the claim cannot now be said to be defective in a strikeout sense on those grounds.

23 That leaves the question of 'who'; that arises in this way not because there could not be a claim against the second defendant on the basis that the decontamination duties included a duty to remove obstacles - that is a matter for debate afterwards - but whether the claimant is saying that it is either defendant or both defendants and, in which case, how. The particulars of claim are problematic in that sense in that while, on the face of it, loss and damage (which is not itself particularised) is claimed against both in respect of their respective breaches of duty. Other parts refer to "or". When the question of which responsibility is allocated to which defendant in request 22, this received the somewhat Delphic response:

> "The claimant is not yet in a position to allocate responsibility for the failure to remove each underground structure as between the two defendants."

Mr Goodkin, in argument, sought to row back from that somewhat by saying that as presently advised, the case was against both of them.

24 If they were right that a duty to decontaminate or remediate on a proper construction of the documents included a duty to remove all obstacles and structures, I can see the force of that case, and it is part of the claimant's case. It may be not be the strongest of cases but that is for another day.

25 The question therefore is whether the absence of a detailed explanation of the allocation of responsibility between both defendants and, in particular, whether there is an alternative to saying they are both liable for the same damage (to the effect that one may be liable for part of the damage and the other may be liable for the other part) is a defect which is so fundamental that it deprives the claimant of a viable claim as presently put, or whether this brings the case within the *Nomura* principle of abuse.

26 So far as the first point is concerned, despite the infelicities of using the word "or", I think one has got to take a common-sense view of this claim and particularly having regard to the allegation that the decontamination duties, including the duties to remove, it would not be right to say that the particulars of claim are defective in the sense that there were some key elements simply missing. Whether there should be further particularisation on this issue is another matter.

27 There then comes the question as to whether this case falls within the *Nomura* principles and it is necessary for me to say something about that case. This was a case where it was plain that the claim form had to be issued when it was because of a limitation problem. The putative claim brought by Nomura against the defendants was a conditional claim. It would only be required and indeed could only exist if there had been a claim against Nomura which would then be entitled by various documents to bring that claim over against the defendant so as to receive an indemnity.

28 At the time when the claim was issued, Nomura had no idea at all about whether a claim against it was ever going to be issued and, if it did, what it would consist of and what its loss would consist of. In fact, whether indeed it really wanted to bring a claim was wholly uncertain because it had no desire to bring a claim if no claim was brought against it. That is really the short background to it and all of that was revealed by one of the witness statements filed in support of Nomura which contain passages like this:

> "If West LB decides not to pursue the claim, there will be no need for Nomura to pursue the Nomura claim and significant costs will be avoided."

29 At paragraph 37, Cooke J summarise the principles:

> "...the key question must always be whether or not, at the time of issuing ... the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshall what it knew, to formulate Particulars of Claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse ... without the additional absence of known valid grounds ... the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way [and I emphasise those words], a claimant has no business to issue ... [the claim] ...'in the hope that something may turn up'. ...in such circumstances ... the ... claimant hopes ... to stop the limitation ... and ... deprive the defendant of a potential limitation defence. The ... claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must ... be an abuse of process."

30 Then so far as that case was concerned, he found at paragraph 42 it had not decided to pursue a claim. It was simply a step to protect its position because if West decided not to pursue its claim against Nomura, Nomura would not pursue any claim against Granada. Then it was said that it could not say what the inaccurate information was that it would rely upon because it did not know because West had not told it. Without that information, Nomura was in no position to say whether or not there was any inaccuracy in the information given by Granada. All that Nomura could say at the time of issue was there had been a common effort to produce information to West for the purpose of obtaining loan facilities and on the light of all of that, he said that that was an abuse of process.

31 In my judgment, this is a quite different case. First of all, on any view, the claimant intends to proceed with this action. It is not conditional on what may happen with a third party. Secondly, it cannot be said here that the particulars of claim, even in a rudimentary way, do not set out what the claim is. The core of the claim is obvious. The argument is that the defendants failed to remove obstructions and structures which were there on the site and which they had promised, on the claimant's case, to remove.

32 Now that the detail of the nature of the obstructions and their location have been particularised, the only question is whether the claimant's true case is going to be that both of the defendants are equally responsible for all the damage and for all the obstructions, or whether either principally or as an alternative one defendant is going to be allegedly responsible for one bit and the other defendant is responsible for another bit.

33 I appreciate that the claimant's case needs to be fleshed out in this regard. I accept that it is not going to be good enough for the claimant to say that all of that can be done with the service of an expert report in due course - that is putting things the wrong way round - but I do not accept that this puts this claimant in the same position as the claimant in *Nomura* where it really issued a wholly speculative claim where it could not begin to particularise what the complaint was. It had no settled intention to issue it and it was really issued on the basis, as the judge said, that something might turn up. Decisions as to whether cases fall within the abuse category delineated by the judge in the *Nomura* case are classically highly context and fact-sensitive and I have no doubt that in the context of this case, while plenty of criticism can be made by the initial lack of particularity, it cannot be said that it is an abuse of process.

34 For all those reasons, therefore, I am not going to strike out the claim. However, I need to make three supplemental points. The first one is, as I have indicated, the claimant is stuck with the table in the further information in terms of the obstacles, and the structures, and other matter that it relies upon. Any further claim in respect of contamination will require an amendment. Secondly, because it is not clear to me whether the claimant is simply saying that both defendants are equally liable and have no alternatives, I am going to order the claimant to particularise now, by which I mean I am going to make an order now, the following things. I am not drafting but they will be as follows. The claimant must state in relation to each defendant and in relation to each obstruction complained of, in other words in relation to each and every of the 72 items complained of, and in relation to each defendant:

(1) Whether it is alleged that that defendant is in breach of contract in relation to that item; and

(2) All facts and matters relied upon in support of that allegation.

35 That, therefore, will flush out whether the claimant is going to say that both defendants are conterminously liable or whether, having thought about it some more, it cannot make all of the allegations of failure to remove against the second defendant, for example, and which items it says it is responsible for and which items it is not responsible for, or an alternative case. That is something which I consider the defendants need to know before they proceed further.

36 Secondly, I am going to order the claimant to state fully and precisely and in respect of each defendant full details of the loss and damage claimed. There is no reason why the claimant should not state now what it is going to cost it to remove all of the obstructions. I would be surprised if it does not already have a ballpark figure because it must have considered what its losses are before deciding that a claim of this kind is viable.

37 Both of those matters may well require the assistance of an expert and, if so, the claimant is going to have to get on with it now. I am not going to order the production of any defence until and unless those particulars are provided and I can say that if the particulars are not provided in the time which we will discuss, it is likely to be followed by an unless order, and if the unless order is not complied with the claim will be struck out.

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