



Neutral Citation Number: [2024] EWHC 1698 (TCC)

Case No: HT-2022-000287

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

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 03/07/2024

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

(1) WEST 28TH STREET LIMITED
(2) UKRP (FOXHOLES) LIMITED (in
liquidation)

Claimants

- and -

HALSTEAD ASSOCIATES LIMITED
(TRADING AS HALSTEAD ASSOCIATES)

Defendant

Rebecca Drake (instructed by **Beale & Co**) for the **Defendant**
James Hall (instructed by **Trethowans LLP**) for the **Claimant**

Hearing date: 14 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR ROGER TER HAAR KC

Mr Roger ter Haar KC :

1. There are three applications by the Defendant before the Court:
 - (1) That the First Claimant's Claim be struck out;
 - (2) Alternatively to (1), that there be an order for security for costs as against the First Claimant;
 - (3) That there be an order for security for costs as against the Second Claimant.
2. On 14 June 2024 I heard argument on the first of those applications. This is my judgment on that application.
3. The other two applications were adjourned for a further hearing on 24 June 2024 for two reasons: firstly for lack of time and secondly so that consideration could be given to the terms of an ATE policy proffered by way of security.
4. This case concerns the refurbishment of an existing house and the construction of three new houses at a development in Exmouth called Foxholes Hill (the "Site"). The Second Claimant was the owner of the freehold title to the Site, and engaged a contractor called Country and Coast Homes Limited ("Country & Coast") under a JCT Contract. The Defendant was the Employers Agent and Quantity Surveyor in respect of the development.
5. The Defendant's contract was with the Second Claimant.
6. Upon Country & Coast's entry into administration, the JCT Contract was terminated. The Second Claimant then appointed a replacement contractor, "Towergate".
7. The Second Claimant entered into administration on 4 May 2020 and creditors' voluntary liquidation on 10 May 2021.
8. The Claimants allege that the Defendant was negligent and/or in breach of contract in respect of the development at the Site in relation to:
 - (1) Inspection and/or monitoring;
 - (2) Incorrect and/or over-certification of payments; and/or
 - (3) Management and identification of delays to the construction programme.
9. The issues on the strike out application turn upon provisions of two documents.
10. The first document consists of the Terms upon which the Defendant was engaged. My attention was drawn to two provisions of the Terms:
 - (1) Clause 1.3:

The services we provide are for your benefit only as specified in the fee arrangement letter. Unless otherwise agreed, no third

party shall have the right under the Contracts (Rights of Third Parties) Act to enforce any terms of the contract.

(2) Clause 9.1:

Neither party shall assign the whole or any part of the benefit or in any way transfer the obligation of the appointment without the consent in writing of the other.

11. The second document is dated 22 March 2022 and is headed “Assignment Agreement (Agreement)”.
12. The agreement refers to the Second Claimant as “The Company”.
13. Clause B provides:

Insolvency Proceedings

The Company entered administration on 4 May 2020 and Andrew Knowles and Phillip Francis Duffy were appointed joint administrators. Subsequently, the Company was placed in liquidation (**Insolvency Proceedings**) on 10th May 2021, with Andrew Knowles and Phillip Francis Duffy appointed as liquidators. On 16 May 2021, Mr Duffy was replaced by Michael Lennon as liquidator, and Andrew Knowles and Michael Lennon (the **Officeholders**) continue to act in that capacity. The Officeholders have formed the commercial judgment that the terms of this Agreement are in the best interests of the creditors of the Company and the Insolvency Proceedings generally. The Company and the Officeholders (**Assignors**) have agreed to legally and beneficially assign the Assigned Claims to West 28th, which is in the business of purchasing claims and legal disputes from insolvent estates and businesses facing closure, restructuring or insolvency. Following the assignment, West 28th intends to take all steps, at its absolute discretion, to pursue the Assigned Claims and to achieve a recovery.

14. Clause D provides:

Assigned Claims: means all debts, actions, claims, rights, demands and set-offs that the Assignors have against the Defendant(s) including (for the avoidance of doubt) the entitlement to any proceeds, fruits, damages, or compensation arising from such claims, or relief consequent on such claims including (but not limited to) claims for breach of contract and professional negligence.

Defendant(s): means Halstead Associates Limited (t/a Halstead Associates (**Halstead**)) and/or Andrew Halstead and

any providers (to Halstead and/or Andrew Halstead) of professional indemnity insurance.

15. Attached to the Assignment Agreement were “Terms and Conditions”. The Terms and Conditions include:

- (1) Clause 3:

ASSIGNMENT

3.1 With effect from the date of this Agreement, the Assignors legally and beneficially assign to West 28th absolutely all of their rights, title and interest from time to time in and to the Assigned Claims (**Assignment**).

3.2 The Assignors agree to send the Defendant(s) notice of the Assignment within two Business Days of written request by West 28th, in the form set out at Schedule 1 to this Agreement.

- (2) Clause 4:

TRUST AND POWER OF ATTORNEY

4.1 In the event that, for any reason, the Assigned Claims are not effectively assigned to West 28th by this Agreement, then:

4.1.1 the Assignors shall hold the Assigned Claims on trust for West 28th absolutely (**Trust**);

4.1.2 it is agreed that the Assignors shall not bring proceedings against the Defendant(s) in relation to the Assigned Claims unless in the reasonable opinion of West 28th it becomes necessary or desirable to do so, and consent to West 28th bringing proceedings in its own name against the Defendant(s); and

4.1.3 if in the reasonable opinion of West 28th it becomes necessary or desirable for the Assignors shall join the proceedings and shall appoint West 28th as their attorney to take any necessary steps in or in relation to such proceedings with power to do any act, and execute and deliver any deed or other document, on behalf of and in the name of the Assignors, which the Assignors could be required to do or execute in relation to the Assigned Claims.

4.2 The Assignors shall promptly do all such acts or execute all such documents as West 28th may reasonably specify (and in such form as West 28th may reasonably require to give effect to Clause 4.1.3).

16. The Defendant’s strike out application is brought under CPR 3.4(2) which provides:

The court may strike out a statement of case if it appears to the court –

- a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
 - b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal or the proceedings
17. The Defendant attacks the claim brought by the First Claimant in its capacity as assignee. The Defendant contends that by reason of Clause 9.1 of the Terms of its engagement the assignment is ineffective to vest the Second Claimant's contractual rights in the First Claimant.
 18. In support of that contention, Ms Drake relies upon the decision of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85.
 19. Mr Hall, for the Claimants, did not in the event seriously contest that issue. He was right not to do so: in my judgment the decision of the House of Lords in *Linden Gardens* is conclusively binding upon me.
 20. Accordingly insofar as the claim is brought by the First Claimant as assignee, the claim will be struck out.
 21. However, in the argument before me the dispute really turned upon Clause 4 of the Terms and Conditions of the Assignment Agreement.
 22. In paragraph 23 of the Reply to Defence, the Claimants plead as follows:
 - As to paragraphs 34 and 35:
 - a. Clause 4.1 of the Agreement, as set out at paragraph 30(f) of the Particulars of Claim, both declares a trust of the assigned claims for the benefit of the First Claimant, and gives the First Claimant certain powers to commence and control proceedings against the Defendant;
 - b. Paragraph 32 of the Particulars of Claim makes clear that the Claimants rely on the said declaration of trust in the event that the assignment of the claim is otherwise ineffective;
 - c. Even if a clause agreed between parties prevents a legal assignment of a cause of action that one has against another, that will not prevent the assignor from holding the claim on trust for the assignee, unless the wording and/or purpose of the contract was clearly inconsistent with such a construction and particularly not where there has been an express declaration of trust. Clause 4.1 of the assignment operates as such an express declaration of trust and also makes clear that if the assignment fails at law for any

reason then the assignor (the Second Claimant) will hold the claims on trust for the assignee (the First Claimant)

23. In support of that pleaded case, Mr Hall referred to the first instance decision of Lightman J. in *Don King Productions Inc. v Warren* [2000] Ch. 291. An important issue in that case was whether a declaration of trust of the benefit of obligations or profits from a contract in favour of a beneficiary could be effective in circumstances where an assignment to that same beneficiary was ineffective.

24. Lightman J. set out the applicable principles. Firstly, in respect of assignment, he said¹:

The contract may expressly or impliedly permit assignment of rights not otherwise so assignable

The contract may likewise prohibit assignment of rights otherwise prima facie assignable. Such contractual provisions are legal effective. The purpose of the non-assignment clause is the genuine commercial interest of a party of ensuring that contractual relations are only with the person he has selected as the other party to the contract and no one else. This is particularly important in areas such as building contracts which are “pregnant with disputes:” see the *Linden Gardens* case

25. Then, in respect of declarations of trust, he said²:

A declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment of the benefit of the contract to that third party Whether the contract contains a provision prohibiting such a declaration of trust must be determined as a matter of construction of the contract. Such a limitation upon the freedom of the party is not lightly to be inferred and a clause prohibiting assignments is prima facie restricted to assignments of the benefit of the obligation and does not extend to declarations of trust of the benefit ...

26. Lightman J.’s decision was appealed: the appeal was dismissed. The discussion of the matters referred to above, was limited: no doubt was expressed by the Court of Appeal upon what Lightman J. had said.³

27. The above principles have been reflected in paragraph 3-050 of *Snell’s Equity*:

The rights of the assignor against the debtor, and those of any assignee deriving title through him, depend on the terms of the contract. So the default rule at common law is that a contractual provision prohibiting assignment makes the assignment ineffective as against the debtor

¹ At page 319B-C

² At pages 319G-320A

³ See pages 335-336, paragraph [26]

The default common law rule only applies to transactions that operate as direct assignments. A prohibition on assignment does not necessarily prevent the creditor from declaring a trust of his rights for a third party.

The construction of the transaction as a declaration of trust would only be excluded if it was inconsistent with the wording or purpose of the contract. It is possible even where the contract is for personal services, provided that it would not require the beneficiary of the trust to interfere in the day-to-day performance of the contract. In general, only the trustee would have the right to sue the debtor or obligor, though he would have to account to the beneficiary for the proceeds of the claim. If the trustee refused to sue, then the beneficiary would sue the debtor or obligor, and join the trustee as a second defendant.

28. In this case Ms Drake argued that the Terms of the Defendant's engagement should be construed as preventing a declaration of trust, and therefore that Clause 4 of the Terms and Conditions attached to the Assignment Agreement was ineffective to create a trust.
29. In the context of a strike out application, I have to determine whether the claim put forward is arguable. I have no doubt at all that there is a valid argument that Clause 4 is effective as establishing a trust in favour of the First Claimant as beneficiary. Accordingly, insofar as the Defendant's application relies upon an assertion of the invalidity of the Clause 4 trust, I reject that as a basis for striking out the First Claimant's claim.
30. However there is a further argument which is that the appropriate party to sue to give effect to the Clause 4 trust is the Second Claimant as trustee, not the First Claimant as beneficiary.
31. That this is appropriate is supported by the last paragraph of the passage from *Snell's Equity* set out above. CPR 19.10 provides:
 - (1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ("the beneficiaries").
 - (2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings.
32. The notes in the White Book say:

Rule 19.10 lays down a general rule that trustees are the proper claimants in proceedings against third parties based on causes of action arising in respect of the trust in question. Beneficiaries who wish proceedings to be taken on behalf of the trust against third parties, can require the trustees to bring

those proceedings (on terms giving the trustees an indemnity in respect of the costs thereof). Another aspect of this rule is that, except in special circumstances, a beneficiary has no standing to bring proceedings in his personal capacity against third parties relating to the causes of action vested in the trustees

33. Ms Drake refers to CPR 19.10 and argues that any claim based upon the Clause 4 trust should be brought by the Second Claimant as trustee, not by the First Claimant as beneficiary.
34. I accept that argument. It follows that the First Claimant not only has no standing as purported assignee, it has no standing as beneficiary under the Clause 4 trust.
35. I can discern no other basis upon which to give the First Claimant standing in this action.
36. Accordingly, for the reasons given above, I accept that the claim brought in the name of the First Claimant should be struck out.