Neutral Citation Number: [2020] EWHC 1322 (Ch)

Case No: BL-2017-000488

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2020

Before :

Mark Anderson QC

- -

Between :

PROPERTY PROTEA HOLDINGS LIMITED

Claimant

- and -

(1) 119 MOLYNEUX ROAD LIMITED
(2) ROBERT WARE
(3) EAD SOLICITORS LLP (In Administration)
(4) LANCASHIRE MORTGAGE CORPORATION LIMITED

Defendants

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- -

Gideon Roseman (instructed by **Helix Law Limited**) for the **claimant**
George Spalton (instructed by **DAC Beachcroft LLP**) for the t**hird defendant**

Hearing dates: 10 March 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 AM 26 May 2020

MARK ANDERSON QC:

1. The claimant was incorporated for the specific purpose of acquiring a commercial property (**the Property**) from the first defendant (**Molyneux**) of whom the second defendant (**Mr Ware**), was the sole director.

2. The third defendant (**EAD**), is a firm of solicitors. Its Mr Jonathan Gorman was retained by the claimant to act as its conveyancing solicitor in the transaction.

3. The transaction went wrong and caused loss to the claimant. The claimant sues EAD for damages for breach of its duties. The claimant has applied for summary judgment. The application is now largely conceded, leaving a narrow issue for me to decide.

The two transactions and their outcome

4. The transaction between the claimant and Molyneux (Transaction 1) was completed in early October 2016 whereupon it was Mr Gorman's duty to attend to registration of the claimant's ownership within the priority period of 30 days (rule 147 of the Land Registration Rules 2003). He failed in that duty. This failure enabled Molyneux to undertake a second transaction, Transaction 2, which had disastrous consequences for the claimant. Mr Ware caused Molyneux to borrow a large sum of money from the fourth defendant, a commercial lender, and, taking advantage of Mr Gorman's failure to register the sale, offered the Property as security for the loan. The fourth defendant, ignorant of the sale and innocent of any wrongdoing, was able to register its charge against Molyneux's title to the Property and thereby to complete its security. Surprisingly, the same firm of solicitors acted for Molyneux in Transaction 2 as had acted for it in Transaction 1.

5. The result of Transaction 2 was that the claimant was left with the Property encumbered with the fourth defendant's charge. The amount secured by that charge is currently £551,806 and therefore the claimant's interest in the Property is diminished by that amount.

The proceedings

6. The fact of Transaction 2 was not discovered by the claimant until December 2017. The claimant issued a claim form against Molyneux, Mr Ware, EAD and the fourth defendant (against whom, in the event, no claim was pursued).

The claimant's pursuit of Molyneux

7. On 5 December 2017, before serving the proceedings, the claimant obtained a freezing and proprietary injunction against Molyneux and Mr Ware. This order was continued at the return day on 12 December 2017 and at a further hearing on 22 December 2017.

8. On 15 December 2017 Helix Law Limited (**Helix**), solicitors for the claimant, wrote to DAC Beachcroft LLP (**Beachcroft**, solicitors for EAD) to inform them that the proceedings had been issued and to ask that EAD provide an indemnity against the claimant's costs of pursuing certain third parties who had been identified as having possibly received some of the proceeds of Transaction 2. The letter said "Our client has no obligation to pursue these third parties and is conscious that doing so will incur further costs that ultimately we will seek to recover from your client. If your client confirms their costs indemnity in respect of our client's costs in pursuing applications to freeze and/or seek further disclosure on a Norwich Pharmacal (bankers trust) basis in respect of these third parties, our client will consider offering assistance to your client. Alternatively we do not intend to issue further applications save in respect of the First and Second Respondents and Defendants in these proceedings, as to which our client's position is reserved entirely." That request was repeated in an email the following day, and was extended to include a request that EAD underwrite the costs of a committal application against Mr Ware, who was accused of failing to comply with an order to disclose details of his and Molyneux's assets.

9. EAD did not provide the costs indemnity which had been requested, but the claimant nevertheless proceeded to seek relief against third parties, and did issue the committal application. The following is the extent of my knowledge of the applications which the claimant made:

a. A Norwich Pharmacal order against a firm of solicitors was obtained (unopposed) in December 2017, requiring it to provide information about bank accounts held by Molyneux.

b. An application to commit Mr Ware for contempt, namely failure to provide information about bank accounts, was issued in December 2017 and adjourned in April 2018 upon Mr Ware undertaking that he would consent to any application by the claimant for disclosure of banking information relating to 25 companies of which he was a director.

c. The committal application was dismissed by consent in May 2018. Although the reasons for not pursuing it are not explained in the evidence, it is apparent from the April order that a measure of cooperation was secured from Mr Ware.

d. The order dismissing the committal application also disposed of Norwich Pharmacal applications against National Westminster Bank and HSBC Bank. The evidence reveals nothing more about these applications.

e. A freezing order was made on 21 May 2018 against two respondents connected to Mr Ware, under the jurisdiction established in TSB Private Bank International v Chabra [1992] 1 WLR 231.

10. In May 2018 Mr Ware was made bankrupt. He made an application to extend time for service of his and Molyneux's defence pending an appeal against the bankruptcy order, but that was struck out on 1 November 2018. The claim against Mr Ware was not pursued following his bankruptcy. The claimant's default judgment against Molyneux, granted in February 2019, went unsatisfied.

11. The litigation against Molyneux, and the applications against third parties, uncovered none of the proceeds of Transaction 2 and yielded no financial benefit. In August 2019 the claimant's costs of the claim against Molyneux were certified by default at £201,915.40, but none of that was paid. So the litigation ended up exacerbating, not mitigating, the claimant's losses. The claimant now seeks to recover those losses from EAD.

The proceedings against EAD

12. On 6 December 2017 Helix wrote a detailed letter of claim to Beachcroft, but did not wait for a detailed letter of response before serving the claim form on EAD later that month.

13. The claim was contested by EAD. Its defence admitted the primary facts as summarised above, but did not admit that those facts amounted to a breach of duty.

14. However shortly before the hearing before me, EAD admitted breach of duty and admitted liability for the sum required to redeem the fourth defendant's charge. The only remaining area of disagreement concerns the costs of pursuing Molyneux.

EAD's administration

15. On 13 September 2018 administrators were appointed to manage EAD's affairs pursuant to Schedule B1 of the Insolvency Act 1986. By paragraph 43(6) of that Schedule, this claim could not be continued without the consent of the administrators or of the court. The claimant/Helix did not know of this development and EAD/Beachcroft did not inform them of it at the time. On 9 December 2019, after this application for summary judgment had been issued, a letter from Beachcroft to Helix referred to "Our Client: EAD Solicitors LLP (in administration)" but did not draw further attention to the issue in the body of the letter and Helix did not spot the point. It was not until 18 February 2020, two weeks before the hearing, that Beachcroft wrote "As you will be aware, our client is in administration. Please let us know when your client obtained consent from the Administrators to proceed with its claim." As it turned out, Helix was able to obtain that consent in time for the hearing.

The issue between the parties

16. It is well established that a claimant, whose solicitor's negligence has resulted in a dispute with a third party which has foreseeably resulted in litigation, can, in a subsequent action, recover the reasonable costs of that litigation from the negligent solicitor.

17. In this case, the claim is not made in a subsequent action but in the same one as that in which the costs were incurred. Therefore the costs of the entire claim, including those against Mr Ware and Molyneux, are in the discretion of the court under section 51 of the Senior Courts Act 1981, and may or may not eventually be awarded against EAD in the exercise of that discretion. But that is not the claim which the claimant primarily advances. The claimant advances a claim for the costs as damages.

The issue as defined in the statements of case and as refined at the hearing

18. That claim is not explicitly pleaded. The claimant's losses are particularised in paragraphs 41 and 42 of the particulars of claim. No mention is made of the costs of suing Mr Ware and Molyneux.

19. EAD's pleaded defence was that "Any loss suffered by the Claimant … is limited to the amount required to redeem the Fourth Defendants charge." Since the claimant had not specifically pleaded its costs of pursuing Molyneux as damages, it is unsurprising that EAD's defence said nothing about that issue. However Mr Spalton did not submit that the claim for costs as damages was not open to the claimant, and accepted that the claimant is entitled to recover those costs in principle - but only if and to the extent that it was reasonable to incur them.

20. The dispute is therefore about reasonableness, and how it is to be assessed. Neither party suggests that I determine the amount of the costs, if any, which the claimant should recover from EAD. Both parties agree that there must be another hearing for that. They disagree as to the form of the hearing and the issues which should be left to it, as explained in the next section.

The claimant's position

21. The claimant's evidence in support of its application for summary judgment was contained in a witness statement by its solicitor Alex Cook, dated 16 October 2019 and served with the application notice shortly thereafter. It provided a brief history of the litigation and exhibited all the orders which had been made by the court.

22. In addition the evidence includes the claimant's bill of costs, certified by Helix that the bill is accurate and complete, and that the costs claimed in it do not exceed the costs which the claimant is liable to pay.

23. The claimant's principal position in its notice of application was that it should be awarded the certified sum of £201,915, and Mr Roseman opened his submissions by suggesting that judgment should be entered for that amount. However at an early stage of the hearing Mr Roseman recognised that EAD had not been party to the assessment proceedings and was not bound by the certificate, and revised his position. He submitted that I should award summary judgment for the costs of the claim against Molyneux, and, although the judgment would be for damages, that I should order those costs to be quantified by means of a detailed assessment on the indemnity basis.

24. A detailed assessment on that basis would allow EAD to challenge whether the costs of the litigation against Molyneux were reasonably incurred and reasonable in amount. The test which would be applied to decide whether a step was reasonable is that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interest of his client: Francis v Francis and Dickerson [1956] P 87. The burden of proof would be on EAD.

25. However Mr Roseman accepted that a detailed assessment would not permit a challenge to whether it was reasonable to begin the litigation in the first place, and to continue it for as long as it was continued. Mr Roseman submitted that EAD has no real defence on those issues. The only real issues, he submitted, are those which would be addressed in a detailed assessment.

EAD's position

26. EAD's evidence was contained in a witness statement from its solicitor Kateren Peers dated 2 March 2020.

27. Ms Peers' statement asserted in paragraph 16 that "The Claimant wholly failed to follow the pre-action Protocol for Professional Negligence. No Letter of Claim has ever been served." The second sentence is surprising in light of Helix's letter of 6 December 2018 mentioned in paragraph 12 above.

28. In paragraphs 18 to 21 of her statement, Ms Peers said this:

> *18 It was entirely unnecessary for the Claimant to issue proceedings in the manner it did against the Third Defendant. Thereafter, as I now understand, the Claimant proceeded to incur disproportionate and unnecessary costs in the pursuit of the First and Second Defendants, such costs which it now seeks from the Third Defendant. I will comment on this further below.*
>
> *19 I note the brief summary of the procedural history set out at paragraphs 16-22 of Mr Cook's Seventh Witness Statement. As mentioned, this brief summary does not fully demonstrate the lengths to which the Claimant has gone in pursuing the First and Second Defendant for what was ultimately, and quite clearly always was going to be, an unsuccessful recovery process. It is not clear to the Third Defendant what enquiries and assessments were made by the Claimant before it embarked on its pursuance of the First and Second Defendants but in any event, such course of action was taken before the Third Defendant was involved. The Third Defendant was not a party to any of the numerous Applications made by the Claimant and was not served with copies of the Applications or Orders given. Having only just (by letter dated 21 February 2020) been provided with some of the Orders, following a request to the Claimant's solicitors, the Third Defendant has now been able to ascertain most of the procedural history.*
>
> *20 The Third Defendant's involvement in the procedural history is limited to service of its Defence on 9 April 2018 and the Claimant's Application for Summary Judgment against it on 16 October 2019. The Third Defendant was also served with the First and Second Defendant's application to extend time for service of its Defence. Otherwise, the Third Defendant played no further part - and nor was it invited to play a part - in the rest of the proceedings.*
>
> *21 ...the position adopted by the Third Defendant in its Defence was entirely reasonable given the complete lack of disclosure given by the Claimant, and its failure to follow the Pre-Action Protocol, the purpose of which is to exchange information and avoid unnecessary costs.*

29. At the hearing Mr Spalton put EAD's case in terms of mitigation of loss. He did not challenge the foreseeability of the costs of pursuing Molyneux nor argue that they were too remote to be recovered as damages for EAD's breach of contract, or for the tort of negligence. Both counsel treated the issue before me as raising the principles of mitigation of loss rather than remoteness.

30. Mr Spalton submitted that that the issue of whether EAD should be held liable for the claimant's costs of pursuing Molyneux, and quantum if it arises, are not properly matters for summary judgment. He submitted that EAD has a real prospect of establishing a defence that it was not reasonable for the claimant to pursue the litigation against Molyneux, at least not as far or for as long as it did. Therefore summary judgment for the costs would be inappropriate.

31. Mr Spalton deployed two main points to demonstrate the existence of such a defence and that it has reasonable prospects:

    a. The claimant failed to follow the Pre-Action Protocol for Professional Negligence before issuing the claim against EAD, did not provide information to EAD about its pursuit of Molyneux and failed to engage with EAD to establish the extent to which it was reasonable to incur the costs of pursuing Molyneux.

    b. The claimant incurred "the remarkable sum" of £201,915 pursuing Molyneux without any success. Mr Spalton submitted that EAD is entitled to explore whether it was reasonable to pursue that litigation as well as whether the costs should be reduced upon detailed assessment.

32. Mr Spalton also criticised the claimant for failing to take any steps to lift the statutory moratorium in place over EAD until shortly before the hearing.

33. Mr Spalton submitted that it would be wrong to order the claimant's costs to be quantified by means of a detailed assessment, since such an assessment would not permit EAD to make the challenges which it is entitled to make (outlined in paragraph 25 above) and in which it has a reasonable prospect of succeeding. He submitted that I should give directions for a trial to decide the issue. Those directions should, he said, include an order for disclosure. Mr Spalton alternatively

submitted that if (contrary to EAD's primary position) there is to be an assessment of the claimant's costs, it should be on the standard basis not the indemnity basis.

Summary judgment: the principles as they apply to this dispute

34. CPR 24.2 provides that the court may give summary judgment against a defendant on the claim or a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial.

35. In the context of this application this means that I should award the claimant its costs of pursuing the litigation against Mr Ware and Molyneux, to be subject to detailed assessment, unless EAD has a real prospect of establishing a defence which would not be open to it at a detailed assessment. Neither counsel made detailed submissions about what objections to a bill of costs can or cannot be pursued upon a detailed assessment. Both parties proceeded, as does this judgment, on the understanding set out in paragraphs 24 and 25 above.

36. The following propositions are uncontroversial:

    a. EAD bears an evidential burden to show that it has a real prospect of establishing a defence of the kind mentioned in paragraph 35 above.

    b. The burden is not heavy.

    c. I must not conduct a mini trial but neither must I take the evidence at face value if there is good reason not to do so.

    d. I should take into account not only the evidence before me, but evidence that might reasonably be expected to become available before a trial. This includes, of course, evidence that might emerge on disclosure.

37. Mr Roseman reminded me of the words of Lord Macmillan in Banco de Portugal v Waterlow [1932] A.C. 452 at 506 that measures taken in extrication from a difficult situation "ought not to be weighed in nice scales" at the instance of the party occasioning the difficulty. Lord Macmillan went on:

> *It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of the duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.*

38. So, at a trial of the kind which EAD seeks, it would have to show that the claimant's pursuit of its claims against Molyneux and certain third parties was unreasonable even after making the allowances of which Lord Macmillan spoke. However I remind myself that this is an application for summary judgment, and my task is not to decide whether the claimant acted reasonably; but whether EAD has a defence with a real chance of being sustained at trial. Fine distinctions based on the standard of reasonableness are unlikely to be decisive at this stage.

Decision

39. I reject the first of Mr Spalton's arguments based on the claimant's failure to comply with the Pre-Action Protocol for Professional Negligence and its alleged failure to provide information to EAD. Although the claimant did not comply with the Protocol, in issuing its claim and serving it without allowing time for EAD's response, there is no basis for supposing that compliance would have saved any of the costs which the claimant incurred.

40. The claimant agreed to an extension of time for EAD's defence, which was not served until 9 April 2018. Having had more than three months to consider its position, EAD entered a firm denial of liability. It "reserved its position" until service of the Molyneux's defence, and "reserved the right to plead further" at that stage. The allegations of breach of duty were "not admitted". Despite having reserved its position until service of Molyneux's defence, EAD did not reconsider its denial of liability when no such defence was forthcoming. It persisted in its refusal to admit liability, or even breach of duty. The direct result of EAD's stance was that this application for summary judgment was issued in October 2019. It was

only shortly before the hearing of this application in March 2020 that liability was conceded.

41. Moreover I have seen no evidence that EAD, or its insurers, at any time showed any inclination to engage with the claimant about its decision whether to pursue Molyneux.

42. In those circumstances I have difficulty understanding on what factual basis Ms Peers asserted, in paragraph 18 of her witness statement quoted above, that it was unnecessary for the claimant to issue proceedings against EAD; nor why she insisted (in paragraph 21) that the position by EAD was reasonable. EAD has not explained what delayed its concession of breach of duty, nor what finally provoked it. So far as I can see, the facts known to EAD were the same in March 2020 as they had been throughout the litigation, and it is difficult to imagine a more obvious breach of duty by a conveyancing solicitor than that committed by EAD.

43. For these reasons I cannot accept that EAD has any real case based on the proposition that if the claimant had refrained from issuing proceedings and instead had awaited a Pre-Action Protocol Letter of Response, EAD would have been more cooperative and it would not have been necessary to pursue Mr Ware or Molyneux at all.

44. I also reject EAD's suggestion that there is any real defence that the claimant somehow failed to mitigate its losses in failing to have the Insolvency Act moratorium lifted sooner. Beachcroft knew about the administration, but Helix did not. Beachcroft decided not to point the problem out to Helix until tactically deploying it shortly before the hearing. Be that as it may, it is unarguable that EAD's administration is somehow relevant to the claimant's alleged omission to mitigate its losses.

45. I therefore turn to Mr Spalton's other point, that the claimant spent a large amount in costs in pursuing Molyneux, and that EAD is entitled to explore whether it was reasonable to pursue that litigation for as long or as far as it was pursued.

46. I think there is good reason not to take at least some of Ms Peers' evidence at face value on this issue. She asserts that the litigation "quite clearly always was going

to be an unsuccessful recovery process". Ms Peers provides no evidential basis for that assertion. When I asked about it at the hearing, Mr Spalton said that Ms Peers was making an observation based on the known outcome. An argument based on hindsight would have no prospect of success at a trial, where the issue would be whether the claimant should have stopped running up costs before hindsight became available.

47. However the fact remains that the claimant spent a large sum in costs for a nil return. It is readily explicable why a person in the claimant's position would want to pursue Molyneux, including for information about their assets. But it would not have been reasonable, or at least arguably not so, for the claimant to prosecute this expensive litigation without keeping under careful review whether a judgment might go unsatisfied, nor to persist in running up costs if such a review would have suggested that the prospects of recovery did not justify it. The fact that the claimant spent so much for a nil return therefore calls for scrutiny.

48. I bear in mind that the litigation against Molyneux was pursued by the claimant without active participation of EAD. I do not criticise the claimant for that, but it means that there is an imbalance of information about whether and why it was reasonable litigation to pursue. Disclosure may be particularly important in such a case.

49. There elapsed 18 months between the filing of EAD's defence and the issue of this application for judgment. It is very tempting to conclude that that interval provided EAD with all the time it needed to undertake whatever scrutiny was appropriate, and to ask the claimant for such information as it needed. I have seen no basis for Ms Peers' claim that it was not until late February 2020 that EAD and its solicitors were in a position "to ascertain most of the procedural history". Paragraphs 20 and 21 of her witness statement, quoted above, gave the impression that the only information which the claimant shared with EAD concerning its pursuit of Molyneux was an anodyne application to extend time; and that otherwise, there was a "complete lack of disclosure" of information. In fact, in January 2018 Helix sent to Beachcroft a copy of the committal application it had issued against Mr Ware, and the evidence in support, together with a copy of the

order of 21 December. It is apparent from subsequent correspondence that Helix sent other documents to do with its ancillary applications to Beachcroft, as well as the entire hearing bundle for its application listed in April 2018. I have seen no evidence that the claimant withheld anything that EAD asked to see.

50. Moreover this application for summary judgment was served on 16 October 2019. When chased for EAD's response to the application in early December, Beachcroft replied that EAD had until 4 March (one week before the hearing) to file its evidence and intended to do so no earlier than that. Beachcroft made no mention of any need to see any further documents before it wrote on 18 February to complain that it had never seen some of the documents in the proposed hearing bundle.

51. However it is not my function to impose sanctions upon EAD for what might turn out to have been questionable tactics. My function is to decide, on the basis of the evidence available or which might reasonably be expected to become available, whether EAD has a real prospect of establishing a defence which it could not pursue within a detailed assessment, on the assumptions mentioned in paragraphs 24, 25 and 35 above.

52. The claimant has said little in its evidence about why it pursued the litigation against Molyneux as far as it did. Indeed it has said little about that litigation at all. I do not overlook that the burden of establishing the existence of a defence lies on EAD. Moreover it is unfortunate that EAD did not deploy its defence of mitigation of loss until service of its witness statement just before this hearing. However the fact remains that there was an imbalance of information as mentioned in paragraph 48 above. The claimant came to court seeking judgment on a summary basis for over £200,000 invested in litigation which yielded nothing. It cannot have been blind to the fact that the court would have been assisted by some account of why that money seemed a worthwhile investment at the time it was made. The claimant was seeking summary judgment in circumstances where that question was likely to be raised, and where the claimant would be in a much better position to explain its conduct than EAD would be to criticise it.

53. I bear in mind also that one, possibly the best, source of information available to EAD is the claimant's detailed bill of costs against Molyneux. This includes an

85-page narrative of the steps in the litigation upon which the costs were incurred, and is informative about the work that was done. However EAD does not appear to have come into possession of this bill of costs until shortly before the hearing before me. I do not think it would be fair to have expected EAD to develop its potential defence with the help of this document, in view of that timescale.

54. For these reasons, although I am unimpressed by much of EAD's response to this application, I am persuaded that it has a real defence based on failure to mitigate, or unreasonable exacerbation of, the claimant's losses. This is based on the simple fact that the claimant spent so much money in pursuing defendants who had nothing with which to satisfy a judgment. It is not for me to say whether I think a defence based on that single feature has much prospect. I conclude that it is not fanciful or imaginary. It is real and merits a trial.

55. No defence of mitigation of loss is pleaded, and I have already identified one reason for that. In any event, my understanding of CPR 24.2 is that if there is a real prospect of a party being given permission to amend to plead a defence, then it would be wrong to ignore that defence upon an application for summary judgment.

56. For these reasons I will accede to the application for summary judgment, but only to the extent already conceded by EAD.

57. I have already mentioned that the claimant's costs of the entire claim, including those against Molyneux, are in the discretion of the court. The claimant's alternative position, if I reject its claim for summary judgment for the costs as damages, is that I should order EAD to pay the claimant's costs of pursuing Molyneux in the exercise of my discretion as to costs, and to order an assessment of the claimant's costs on the indemnity basis. However, having found there to be a real prospect of EAD establishing that it should not pay all of the costs which would be awarded on detailed assessment, I cannot see how I can accede to the claimant's alternative position at this stage. It will be open to the claimant to make whatever application for costs it wants to make at later stages of the claim.