Neutral Citation Number: [2021] EWHC 3269 (Ch)

Case No: HC-2017-002378

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 December 2021

Before:

DEPUTY MASTER MCQUAIL

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Between:

POWIS STREET ESTATES (NO 3) LIMITED	**Claimant**
- and -	
(1) WALLACE LLP	**Defendants**
(2) CRADICK RETAIL (A Firm)	
- and-	
DOUGLAS MOAT LIMITED	**Third Party**

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Mr David Halpern QC (instructed by Forsters LLP) for the Claimant
Mr Jamie Smith QC (instructed by Clyde & Co LLP) for the First Defendant
Mr Graeme McPherson QC and Mr Tom Ogden (instructed by Kennedys Law LLP) for the Second Defendant
Mr Miles Harris (instructed by DAC Beachcroft LLP) for the Third Party

Hearing date: 18 November 2021

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Approved Judgment

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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 2 December 2021 at 2.00 pm

Deputy Master McQuail:

1. This professional negligence claim is brought against solicitors and property agents and arises out of their conduct of the sale of 138-152 Powis Street, Woolwich, London SE18 6NL ("138-152") and the abortive sale of 132-136 Powis Street SE18 6NL ("132-136"). Contracts for the sale of 138-152 were exchanged on 16 August 2011. The claim was issued on 15 August 2017.

2. On 6 July 2020 Master Shuman gave a judgment on the claimant's application to amend the claim form and particulars of claim to substitute the property agents Cradick Retail (a firm) for Cradick Retail LLP which had originally been named as second defendant to the claim. That reference to that judgment is [2020] EWHC 1692 (Ch).

3. On 21 May 2021 Deputy Master Smith gave a judgment on the claimant's application for permission to amend the particulars of claim outside the limitation period. A copy of that judgment was included in the hearing bundle.

5. The judgment of Master Shuman sets out the factual background and I do not repeat it here. I adopt the definitions used in her judgment.

6. On 20 August 2021 Cradick brought a Part 20 Claim against Douglas Moat Practice Limited ("Douglas Moat"), a company that provided architectural surveying and planning services including measured property surveys.

7. The Part 20 Claim concerns the use of inaccurate plans alleged against Cradick by Powis in the main proceedings ("the Inaccurate Plans Claim"). By it, Cradick seeks from Douglas Moat an indemnity against, alternatively a contribution towards, any liability to pay damages and interest to Powis on the Inaccurate Plans Claim and to pay the costs of the Main Proceedings by reason of claimed breaches of duties owed by Douglas Moat in drawing up a series of surveys and plans of 132-136.

8. This judgment deals with two matters that were argued at the Costs and Case Management Conference ("CCMC") in this case which took place on 18 November 2021.

9. The first matter is Powis's application dated 10 November 2021 seeking permission to serve amended replies to both defences, notwithstanding the time for service of those pleadings has passed.

10. The second matter is the scope of the expert evidence which the parties should be permitted to call at trial.

Permission to Serve Amend Replies Out of Time

11. The application for permission to serve the amended replies is supported by evidence contained in the application notice of Jonathan Ross of Forsters LLP, solicitors to Powis.

12. Mr Ross explains that draft amended replies were prepared in June 2019 but not served because Powis was then making its applications to substitute the correct

second defendant and make the amendments to the Particulars of Claim which were in due course determined by Master Shuman and Deputy Master Smith.

13. Deputy Master Smith's Order of 21 May 2021 provided for amended particulars of claim to be served by 28 May 2021, for amended defences to be served by 18 June and amended replies by 9 July 2021. A consent order of 3 June 2021 permitted re-amendment of the particulars of claim in the form annexed to that order ("the RAPOC") and extended the dates for amended defences and replies to 25 June and 16 July respectively.

14. Mr Ross goes on to explain that he and leading counsel proceeded on the basis that they believed the amended replies prepared in 2019 had been served in 2019 and that following service of the amended defences there was no need to make any other amendments to the replies which they believed had been previously served. He says that it was only on reviewing matters in preparation for the CCMC that the omission to serve amended replies came to his attention and that a final form of the amended replies was then provided to the defendants.

15. Mr Ross says that the amended replies simply respond more fully to the original defences than the originals, have caused no prejudice and serve to clarify the claimant's case.

16. So far as necessary Powis seeks relief from sanctions and offers to meet the costs occasioned by late service of the amended replies.

17. Cradick has no objection to the amended reply to its defence.

18. Wallace's only objection is in relation to proposed paragraph 25A.2 of the amended reply to its amended defence.

19. The order made following the hearing records my permission for the amended replies, save for paragraph 25A.2.

Extension of Time for filing and service of amended replies

20. Powis did not serve its amended replies by the 16 July 2021 date set by the consent order of 3 June 2021 and therefore required an extension of that time limit. Its application for extension was made out of time and the WB commentary at 3.9.15 makes clear that the law and practice of CPR 3.9 should be applied in such a case.

21 Accordingly I must apply the three stage test in *Denton*. At the first stage I must consider the seriousness and significance of the failure to comply with the time for service. I must then consider why the default occurred. Finally I must evaluate all the circumstances of the case to deal justly with the application.

22. The breach of the time limit was both serious and significant. Pleadings should have closed in mid-July, instead the present application had to be made and took up time at the CCMC, although it is true that some time would have been taken in event with Wallace's objection to paragraph 25A.2. The breach was only noticed and sought to be remedied some three and a half months after it occurred.

23. Mr Ross has candidly explained the inadvertence that led to non-service of amended replies in July of this year. However, I am puzzled by Mr Ross's evidence about the replies drafted, but not served, in June 2019 not needing further amendment and the amended replies simply responding to the original defences. It is apparent from the argument before me and from this judgment that the proposed paragraph 25A.2 of the amended reply to Wallace's amended defence seeks to raise an issue claim by reference to the amendment to Wallace's defence. No explanation is proffered about the inclusion of the further amendment responsive to Wallace's amended defence.

24. In my judgment the inadvertence referred to is not a good reason for the breach of the time limit set by the consent order of 3 June 2021.

25. However, aside from paragraph 25A.2 no objection is taken to the amended replies and, that paragraph apart, the amended replies have the effect of clarifying Powis's case, which should lead to this litigation being conducted more efficiently and at less rather than more cost.

26. Accordingly, I allowed the amended replies although, in the case of the amended reply to Wallace's defence, without the inclusion of paragraph 25A.2, pending this reserved judgment.

The Disputed Amendment to the Reply to Wallace's Defence

27. Proposed paragraph 25A.2 of the amended reply reads as follows:

> "If Wallace provided such confirmation or if Powis provided such confirmation with Wallaces' knowledge or approval, Wallace thereby acted negligently and in breach of contract insofar as this prevented or arguable prevented Powis from terminating the Dagmar contract or treating it as terminated. Wallace is not

entitled to avoid liability for negligence or breach of contract by relying on its own negligence and breach of contract."

28. In order to understand Wallace's objection, it is necessary to track the point through the statements of case:

(i) Para 45 of the RAPOC pleads that the claimant suffered loss as a result of the first defendant's failure to advise that the Dagmar contract had terminated on 21 or 22 May 2013 so that the claimant was free to re-market or renegotiate with Dagmar;

(ii) Paragraph 54.3 of Wallace's amended defence pleads an allegation, not contained in the original defence, viz. that Wallace confirmed the completion date of 13 June 2013 to Dagmar in an email of 9 May 2013 (54.3.2) with the consequence that, had Powis sought to terminate on or after 21 May 2013, Dagmar would have been likely to resist in reliance on rectification, estoppel, waiver or bad faith (54.3.3);

(iii) Mr Halpern for Powis says that his client is entitled to answer this in one of two ways. Either Powis may dispute by its reply that Wallace may run this defence because it depends on relying on its own negligence in making such a representation to Dagmar. Or it may allege a further head of negligence by a further amendment to the RAPOC;

(iv) Mr Halpern says that paragraph 25A.2 of the proposed amended reply concerns the first way of putting the point and he offers to add words to clarify the amendment by expressly confirming the words of the reply do not plead any additional ground of negligence;

(v) If the point is to be put in the second way Mr Halpern acknowledges that a further application for permission to amend the RAPOC would be required.

29. In response Mr Smith for Wallace points out that the allegation in paragraph 37.5 of the RAPOC is of a breach of duty in failing to advise in the period from 21 or 22 May 2013 to 6 June 2013 that the Long Stop Date had occurred and that the allegation confined to that period is answered by paragraph 54.3.1 of the Amended Defence.

30. Mr Smith says that the new fact pleaded in paragraph 54.3.2 of Wallace's amended defence is that a particular email was sent on 9 May 2013, a date outside the period of the breach of duty alleged in the RAPOC. He says it is only the fact of the email that is newly in issue and that the terms of Wallace's amended defence do not put in issue the wider factual question whether the sending of the email amounted to a breach of duty.

31. Mr Smith therefore says that Powis's proposed 25A.2 seeks to plead by way of reply a new claim or cause of action not founded on facts which are all presently in issue and therefore is not permissible.

The Rules and the Law

32. CPR 16.7 and the White Book ("WB") commentary at 16.7.2 makes clear that in the absence of express admissions by the claimant the defendant will be required to prove the facts raised in the defence whether the claimant files a reply (r.16.7(2)) or does not do so (r.16.7(1)).

33. 16PD.9 paragraph 9.2 provides that:

> "A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court's permission to amend the statement of case."

34. The WB commentary at 16.7.3 refers to the rule in paragraph 9.2 of PD 16 and reads as follows:

> "It states that a reply must not contradict or be inconsistent with an earlier one, for example it must not bring in a new claim and adds that, if the claimant wishes to depart from the case set out in their claim, they should seek to amend that claim rather than serve a reply. In *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514, the question whether amendments to particulars of claim not allowed under r.17.4 (amendment after expiry of limitation period) could be pleaded by way of amended reply to defence was raised but not determined."

34. In my judgment the proposed paragraph 25A.2 contains a new claim not founded on facts which are all presently in issue. It pleads a new and distinct breach of duty from the breaches already pleaded, not least because the breach of duty presently pleaded in relation to termination of the Dagmar Contract occurred no earlier than 21 May 2013 and the email pre-dates that.

35. The WB commentary makes clear that a reply may not include a new claim and that the proper course is for Powis to seek the court's permission to amend the RAPOC. To the extent that it succeeds in any such application it might then be permissible for Powis to seek to deploy its new claim in a further amendment to its reply. I do not accept Mr Halpern's argument that the amendment comprising a new allegation of negligence and breach of contract may simply be permitted by way of response, even if caveated as he suggests.

36. Wallace is entitled to have all the allegations made in the proceedings in one document in order that it may answer them in its own one document. That is the expeditious and fair way of managing the content of pleadings and accords with the overriding objective.

37. If I had not concluded that the proposed amended paragraph 25A.2 should not be permitted to be included in the amended reply because it pleads a new claim, I would have refused relief from sanction in relation to that paragraph as it raises a new claim very late and without any evidence explaining why it, as opposed to the purely responsive parts of the amended reply to Wallace's defence, should be the subject of relief.

Expert evidence

38. Expert evidence has two functions in professional negligence cases:

(i) setting out and explaining the relevant technical matters; and

(ii) assisting the court in deciding whether the acts or omissions of the defendant constituted negligence

(see Jackson & Powell on Professional Liability, 8th Edition at 6-006)

39. In determining whether to permit parties to call experts to give evidence at trial the court must consider:

(i) whether the expert evidence is necessary to resolve an issue;

(ii) if not, whether it would be of assistance; and

(iii) whether evidence which may be of assistance (but not strictly necessary) is reasonably required to resolve an issue.

(see Jackson & Powell on Professional Liability, 8th Edition at 6-012)

40. At the outset of the CCMC the expert evidence issue that was agreed by the parties concerned was that Cradick and Douglas Moat should be permitted to adduce written and oral expert evidence in the field of architecture/building surveying relating to (i) the conduct of the measured and topographical survey of 132-136 and (ii) the preparation of drawings LR01-LR05.

41. In my judgment that evidence will be necessary to determine technical matters and the question whether Douglas Moat's surveys and plans were produced with reasonable skill and care and I gave permission for that expert evidence to be called.

42. Mr Halpern's position at the outset of the hearing was to seek permission on behalf of Powis to call (i) a valuation expert as to various questions relating to 138-152, (ii) a development surveyor or asset manager expert in relation to the overage terms that could or should have been negotiated and (iii) a building surveyor expert as to the inaccurate plans.

43. By the conclusion of the hearing Mr Halpern and Mr Smith for Wallace were in agreement that the only valuation expert evidence for which they sought permission was as to the open market value of 138-152 in May to June 2013, being the date on which Powis claims it might have been able to terminate the Dagmar Contract and renegotiate with Dagmar or resell.

44. In my judgment that evidence would be necessary to resolve the question what damage would Powis have suffered were it to make out its case against Wallace in relation to the claimed breach of duty in relation to termination of the Dagmar Contract. Accordingly I give permission for each of Powis and Wallace to call written and oral evidence of valuation experts as to the value of 138-152 in June 2013.

45. Mr Halpern's position by the end of the hearing was that he still sought permission to call a development surveyor or asset manager expert to give expert evidence as to the time scale for securing of planning permission and as to the time for completion of the development and the sale of the flats to be built at 138-152. His rationale was that Powis need an expert in these areas to counter the evidence that Mr Cradick will give at trial of what he advised and why in relation to these matters.

46. However, Mr Cradick cannot, without permission which has not been sought, and therefore will not give expert evidence. His evidence will be evidence of fact.

47. An expert in the areas contended for by Mr Halpern could do no more than say what he or she might have done or advised or what might have happened in certain events. Those are matters for the commercial assessment of the trial Judge. No such expert evidence, even if its ambit were carefully circumscribed, would be necessary to resolve any issue in the case and would be unlikely to be of any assistance or reasonably required to resolve the issues in the case at a trial before a Judge of the Business and Property Courts. I refuse permission for any party to call such evidence.

48. As to the evidence of a building surveyor, Powis wishes to have an opportunity to consider the expert evidence adduced by Cradick and Douglas Moat and be at liberty to apply thereafter to rely on its own expert in that field and that position is recorded in the Order made at the CCMC.

49. This judgment will be handed down remotely and without attendance. If the parties are unable to agree a form of order a consequentials hearing will be listed on a separate occasion.