Neutral Citation Number: [2019] EWHC 352 (QB)
IN THE HIGH COURT OF JUSTICE **Appeal No: 8BS0004C**
HIGH COURT APPEAL CENTRE BRISTOL
CIVIL APPEAL from Bristol County Court
Order of HHJ Russen QC Dated 19 December 2017
Case Number B19YM822

Bristol Civil Justice Centre
1 Redcliffe Street, Bristol, BS1 6NP

Date: 25/02/2019

Before:

MR JUSTICE MAY DBE

- -

Between:

Zurich Insurance Plc	**Claimant/ Respondent**
- and -	
Nightscene Limited	**Defendant/ Appellant**

- -
- -

Ronan Hanna (instructed by **DAC Beachcroft Claims Ltd**) for the **Claimant/Respondent**
Peter Knox QC & Andrew McGuinness (instructed by **Carter Lemon Cameron**) for the **Defendant/Appellant**

Hearing dates: 05 December 2018

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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 MAY DBE

Mrs Justice May:

1. This is an appeal by the Appellant ("Nightscene") against the judgment of HHJ Russen QC dated 19 December 2017 giving judgment in favour of the Respondent ("Zurich"). It concerns a limitation issue, for which I gave partial leave on 12 February 2018.

Facts

2. These are fully set out in the judgment below. In short, Zurich operated an insurance scheme for developers of new-build homes. Under the terms of its agreement with the developer, and in return for the payment of a fee, Zurich would issue an insurance policy (also referred to as a warranty) to purchasers providing cover for building defects. Under the terms of the policy issued to the homeowners, Zurich agreed, amongst other things, to step in and correct defects once notified by the homeowner if the developer failed to remedy them.

3. The present claim arises out of the construction of a new-build residential property in Birmingham ("the Property"). The Property was one of a series of homes in a development built by Birmingham Property Developments Limited ("BPDL"). BPDL was a subsidiary of Nightscene.

4. There are two principal contracts relevant to this appeal:

   (1) An agreement concluded between Zurich and BPDL in or around 19 July 2004 ("the Agreement") by which Zurich agreed with BPDL to provide insurance policies to purchasers from BPDL of new-build homes at the development. BPDL gave certain undertakings under the Agreement, including the following:

   "4.8 (a) The Developer shall ensure that the new Home is built to comply with the Requirements [set out in Zurich's technical manual] and in a competent and workmanlike manner to Zurich's satisfaction.

   …

   4.14 The Developer agrees to honour the terms of the Warranty where it places any obligation or responsibility on him either to Zurich or to a Buyer.

   4.15 The Developer agrees to correct any Defect within the time notified to the Developer in writing by Zurich. [defined in clause 1 as "A failure to comply with the Requirements in respect of the New Home"].

   4.16 Where Zurich pays any sum relating to the Developer's obligations or responsibilities under this Agreement or a Warranty the Developer agrees that it shall reimburse Zurich with all of the reasonable associated costs Zurich incurs in so doing. ("Clause 4.16")

   4.17 The Developer shall reply fully and within 28 days to any correspondence from Zurich that has been sent to the Developer by recorded delivery to the last address notified to Zurich."

(2) A contract of guarantee entered into between Nightscene and Zurich dated 6 December 2004 ("the Guarantee"), setting out the following principal obligation:

"1.1 The Guarantor [Nightscene] hereby:-

(a) irrevocably and unconditionally guarantees to the Company [Zurich]:-

(i) the full and due performance and observance by the Developer of all its obligations under or arising pursuant to the Scheme and/or the Agreement: and

(ii) the due payment and discharge of all sums of money and liabilities which now are or at any time shall be due, owing or incurred, or payable and unpaid by the Developer to the Company pursuant to the Scheme and/or the Agreement: and

(iii) the due payment and discharge of all losses, damages, expenses and costs arising from the Company exercising its rights against the Developer pursuant to the Scheme or/and the Agreement.

(b) Irrevocably and unconditionally undertakes to the Company that if the Developer fails to fully and completely:

(i) Perform and observe its said obligations: or

(ii) Pay and discharge the said losses, damages, expenses and costs

The Guarantor will indemnify and keep indemnified the Company from and against and forthwith on demand pay to the Company all losses, damages, expenses and cost which the Company may suffer, incur or pay as a direct or indirect result of such failure on the part of the Developer."

5. Pursuant to the Agreement, Zurich issued a policy to the purchaser of the Property on or around 28 February 2006 (the Policy").

6. On 12 April 2007 Zurich received a claim under the Policy relating to defects in the floorboards at the Property. Zurich notified BPDL of the claim two days later on 14 April 2007.

7. BPDL did nothing, after which, in around January 2008, Zurich accepted the claim, making the first payment to its insured by reimbursing the cost of an expert report. Remedial works commenced in April 2008 but ceased when further structural defects were discovered. Works thereafter resumed in 2009, there was an interim payment to the contractor on 11 June 2009 and the final balance was paid on 28 August 2009.

8. On 28 September 2009, Zurich wrote to BPDL, notifying it that it had paid a total of £54,654.51 in respect of remedial works to the Property. The Judge below held that this amounted to a demand for reimbursement (at para [20] of his judgment).

9. On 5 June 2015, having heard nothing from BPDL, Zurich issued a claim against Nightscene under the terms of the Guarantee.

10. As the judge noted in his judgment (at para [9]), Nightscene's defence and its case at trial rested very largely on legal arguments concerning the proper meaning and effect

of the Guarantee, together with a case that any claim arising under the Guarantee was statute-barred.

11. The judge found that the Property was defective and that BPDL was liable to reimburse Zurich pursuant to clause 4.16 of the Agreement. He further held that the full amount was recoverable from Nightscene pursuant to the terms of the Guarantee and that the claim was not statute-barred pursuant to the Limitation Act 1980.

12. Nightscene now seeks to appeal the judge's finding on limitation.

Grounds of appeal

13. In its application notice Nightscene relied on two separate grounds of appeal, in respect of which I granted permission on the second only. There has been no renewed application, accordingly there is no extant challenge to the judge's finding that Nightscene's relevant obligation under the Guarantee was as surety rather than as principal obligor.

14. The ground upon which leave was granted raises three separate issues:

    (1) that the rights under 4.16 were "wholly ancillary to and dependent upon" rights arising under earlier clauses in the Agreement such that once the limitation period had expired for any claims under those earlier clauses then it had also expired for any claim under clause 4.16.

    (2) that Zurich's cause of action for an indemnity from BPDL under clause 4.16 accrued once for all upon the first payment made in January 2008.

    (3) In the alternative, if it was entitled to maintain a claim for any of the payments made under clause 4.16, Zurich was entitled to do so only in relation to those payments made after 5 June 2009.

The judgment below

15. The material parts of the judgment for the purposes of this appeal are to be found at paragraphs [43]-[56]. In summary, the Judge's reasoning was as follows:

    (i) The starting point was "the nature of the promise which is said to have been unfulfilled and to have resulted in a claim": [43]

    (ii) The underlying breach by BPDL was the failure to reimburse Zurich the cost of the remedial works, contrary to clause 4.16: [44]

    (iii) The provisions of clause 1.1 of the Guarantee contain the contractual obligation of Nightscene to pay if BPDL had not: [45]

    (iv) For the claim against Nightscene to be statute-barred, applying a 6-year limitation period: "the court would therefore have to conclude that Nightscene was obliged to pay under clause 1.1 sometime before 6 June 2009: that is before

BPDL had itself been called upon to pay by the letter dated 28 September 2009:" [47]

(v) On the proper construction of clause 1.1 of the Guarantee Nightscene only became liable to pay only after BPDL had first failed to do so: "This is the language of a secondary obligation which is characteristic of a guarantee". [53 and 54]

(vi) Thus, Nightscene's liability under clause 1.1(a)(ii) or 1.1(b) did not arise until BPDL had been called upon to pay, which did not happen until the written demand of 28 September 2009, at the earliest: [54]

The parties arguments and my conclusions

16. The parties were agreed that the relevant date for the purposes of limitation is 6 June 2009.

(i) The nature of BPDL's obligation under clause 4.16

17. Mr Knox QC, for Nightscene, in his skeleton argument contended that clause 4.16 did not give rise to a freestanding duty. It was said that the obligation to pay under that clause was entirely linked to, and dependent upon, BPDL's obligations under the preceding provisions, namely 4.8 (ensuring home built in competent and workmanlike manner), 4.14 (honouring terms of any warranty) and 4.15 (correcting any defect within time notified). As any cause of action for breach of the earlier provisions must have arisen prior to 6 June 2009 it followed that a claim under clause 4.16 was likewise out of time.

18. At the hearing Mr Knox accepted that clause 4.16 gave rise to a separate right of action but argued that it added nothing to the rights of action given under the preceding clauses. Since claims under those clauses were statute-barred the ancillary claim under clause 4.16 was also out of time. There was no express provision permitting Zurich to rely on clause 4.16 for limitation purposes, Mr Knox pointed out.

19. I was referred to the case of *Henry Boot Construction Ltd v. Alstom Ltd* [2005] 1 WLR 3850, which concerned a claim arising out of an engineer's failure to include a sum in an interim and then final certificate. It was argued that as the failure to include the sum in an interim certificate had occurred more than 6 years before proceedings were issued, the claim for a negligent failure to include the same sum in the final certificate was also statute-barred. The court held that the claims were distinct. Dyson LJ, giving the judgment of the court, said this at [54]-[56]:

> "54 But it is important to distinguish between (a) successive claims in respect of the same cause of action and (b) successive claims in respect of different causes of action. In the example of the debt owed by B to A there is only one cause of action, namely the right to repayment of the debt. That cause of action arises no later than when B first refuses to pay. It is obvious that the mere refusal of payment on the second occasion does not give rise to a fresh cause of action….

> 56 In my view, the cause of action in respect of an engineer's failure to include a sum in an interim certificate is not the same as the cause of action in respect of the failure to include a sum in the final certificate, even if the two sums happen to be the same."

20. Mr Knox contended that a claim under clause 4.16 was, in effect, a "successive claim in respect of the same cause(s) of action" arising under the previous clauses in the Agreement. Mr Hanna responded that this was precisely the argument of the type that the defendant in *Henry Boot* had tried unsuccessfully to run in that case. I agree: whilst a breach of clause 4.16 may arise, in general terms, from the same set of circumstances (in this case, defects in the flooring) which would also have given Zurich a right to bring a claim against BPDL under other clauses in the Agreement, it nevertheless gave rise to a separate cause of action in debt for the costs of repairs under clause 4.16. There would otherwise have been no point in including clause 4.16 in the Agreement.

21. The fact that Zurich could have pursued BPDL under other clauses is neither here nor there. Zurich was entitled to choose the contractual route by which to pursue BPDL in respect of the repairs to the Property.

22. Mr Knox next submitted that the terms of clause 4.16 did not require a demand to be made before time started to run. He referred me in this respect to the case of *Legal Services Commission v. Henthorn* [2011] EWCA Civ 1415. In that case the LSC sought to reclaim an overpayment of the balance of fees paid on account made to Ms Henthorn, a barrister. She argued that the claims were out of time, time having started to run from the time the payments to her were made. The court rejected the LSC's argument that the language of the regulation required a formal demand to be made before time could start running, deciding that time ran from when the assessment process was complete. Lord Neuberger explained as follows, at [31]:

> "Save where it is the essence of the arrangement between the parties that a sum is not repayable until demanded (eg a loan expressly or impliedly repayable on demand) it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed"

23. In my view the position which Zurich has taken on this appeal is consistent with the result and the court's reasoning in *Henthorn.* The obligation to reimburse under clause 4.16 in this case did not arise until the final bill was in. This is analogous to the assessment of costs in *Henthorn*. Only then could Zurich have finalised the amount associated with remedying the defects. Once Zurich had taken responsibility for completing the repairs pursuant to its obligations to the homeowner under the Policy, BPDL would have had no visibility of what works were being done, or what costs had been incurred. I agree with Mr Hanna that time did not begin to run for a claim under clause 4.16 until the final repair bill was known.

24. Given my conclusion regarding the effect of the Guarantee, below, it is not necessary to distinguish between the date of ascertainment of the final amount (around end August 2009) and the date on which Zurich notified BPDL and asked for reimbursement (28 September 2009). Both dates are well within the limitation period. On the authority of *Henthorn* I am inclined to agree with Mr Knox that no request/demand for

reimbursement would have been necessary for time to start running for the purposes of any claim against BPDL under clause 4.16.

25. Regarding the position under the Guarantee, Mr Knox submitted that liability was automatic, that no demand was needed. He argued that the absence of any reference to "demand" under para 1.1(a) of the Guarantee meant that Nightscene's obligations arose at the same time as BPDL's and were thus statute-barred at the same time.

26. As I have noted above, there is no extant appeal against the judge's finding that Nightscene's obligations vis a vis BPDL's duty to reimburse under clause 4.16 were as surety, not as primary obligor. Yet the effect of Mr Knox's submission, if correct, would be to render Nightscene liable as primary obligor.

27. Mr Hanna submitted that, even if the terms of clause 4.16 did not require a formal demand to set time running, no cause of action arose under the Guarantee until the amount had been ascertained. The Judge below dealt with it in this way (at [55(c)] of his judgment):

> "…the claim to recover the debt which was due from BPDL under clause 4.16 of the Agreement but remain [sic] unpaid is one that can be made under clause 1(a)(ii) of the Guarantee (and probably 1(b)(ii) also, even if there was no prior demand upon Nightscene). It is clear from the decision of Neill J in *Telfair Shipping Corporation v Inersea Carriers SA* [1985] 1 WLR 553,556, - a decision upon which both parties relied – that there may be obligations of indemnity where time does not begin to run against the creditor until the liability of another has first been established and ascertained. That is the position here."

28. With respect to the judge, I entirely agree with his reasoning set out in this passage. In *Telfair* at 566H, having reviewed a number of authorities, Neill J concluded that the extent of the indemnity and the time at which the cause of action arises will depend upon the proper construction of the contract; but if the indemnity was a general one then time would not begin to run until the liability had been "established and ascertained". On the facts of *Telfair* Neill J found that the earliest point of ascertainment was when liability had been ascertained by the foreign court.

29. On the proper construction of the Guarantee here, I conclude, like the judge below, that time did not start running for the purposes of Nightscene's liability under clause 1 of the Guarantee until the final balance of costs in respect of repairs to the Property was known. In a case like this, where bills come in over time, the total amount can only be "established and ascertained" when the final bills are in and paid.

(ii) Time runs from date of first payment in January 2008

30. Mr Knox's next point concerned the proper construction of clause 4.16 for the purpose of time starting to run. He submitted that if, contrary to his first point, clause 4.16 gave rise to a separate and free-standing obligation, then a claim for breach of this clause arose once and for all upon the making of the first payment out in January 2008 (reimbursement to the homeowner of the costs of an expert report).

31. Mr Knox contended that the words *"all of the reasonable associated costs in so doing"* in clause 4.16 referred to all the costs subsequently incurred in connection with the defects; the first payment, he said, triggered the right to bring a claim for all the other costs incurred in connection with remedying the defects. If the clause were to be construed otherwise, Mr Knox argued, Zurich would have a separate cause of action under clause 4.16 each time it incurred and paid a bill in relation to any investigation, report or remedial work.

32. In my view the words *"..pays any sum.."* in clause 4.16 are key to generating the entitlement. A sum had to have been paid before Zurich was entitled to seek reimbursement of it from BPDL; accordingly the *"reasonable associated costs"* would encompass the amount paid (subject to the requirement of reasonableness) together with any additional expenditure arising in connection with such the payment.

33. It does not follow that a separate cause of action against BPDL arose under clause 4.16 each time Zurich made a payment. As set out above, in circumstances where the parties clearly contemplated that Zurich would undertake a programme of repairs in respect of defects, in my view time did not start running for a claim against BPDL until, at the earliest, the works were complete and Zurich was in a position to finalise the total costs paid by it in respect of such repairs.

34. Even if I am wrong about this last point so far as BPDL's liability under clause 4.16 is concerned, for the reasons given above, Nightscene's liability under the Guarantee did not start to run until the final amount had been ascertained.

35. This view is supported by the wording *"...now or at any time may be due..."* used in para 1.1(a)(ii) of the Guarantee. The same phrase was considered by the Privy Council in *Wright v. New Zealand Farmers Cooperative Ltd* [1939] AC 439 where Lord Russell observed as follows, at 449:

> "It is no doubt a guarantee that the Association will be repaid by the Nosworthys advances made and to be made to them by the Association together with interest and charges; but it specifies in cl.2 how that guarantee will operate – namely, that it will apply to (ie the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted."

36. Mr Hanna submitted that the same wording was used in the present Guarantee precisely because it is a term of art designed to cover a situation where individual sums may be paid, leading up to a final balance. He says that it cannot have been intended that time should run against Zurich as beneficiary under the guarantee from the moment an expert

is paid, perhaps even before a report has been issued, and that these words were used precisely to prevent such a perverse situation arising.

37. Mr Knox pointed out that the nature of the guaranteed obligation was different in *Wright*, as indeed it was, but he did not otherwise suggest what the meaning and purpose of the above phrase was as it appears in clause 1.1(a)(ii) of the Guarantee here. In my view these words serve to underpin the necessity for a final balance to be struck before time started to run.

(iii) Partial time-bar

38. The above analysis deals also with Mr Knox's final point: that time started to run when individual payments were made, such that Zurich were precluded from recovering sums paid before 5 June 2009.

Conclusion

39. As appears from the above, I have concluded the decision of HHJ Russen QC was correct, for the reasons which he gave. The appeal is dismissed.