Case No: HT - 2018 - 000322

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

[2019] EWHC 3727 (TCC)

The Rolls Building
7 Rolls Buildings,
Fetter Lane
London, EC4A 1NL

Date: 15th November 2019
Start Time: **10.51** Finish Time: **11.49**

Before:

MR JUSTICE WAKSMAN

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Between:

(1) TC DEVELOPMENT (SOUTH EAST) LIMITED **(2) BUJ ARCHITECTS LLP**	**Claimants**
- and -	
(1) INVESTIN QUAY HOUSE LIMITED **(2) JOHN DOWNER**	**Defendants**

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MR JAMES MCCREATH (instructed by **IBB Solicitors**) for the **Claimants**
THE FIRST DEFENDANT did not appear and was not represented
MS SARAH CLARKE (instructed by **Hamlins Solicitors**) for the **Second Defendant**

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE WAKSMAN:

1. This is the trial of an action brought by two claimants. The first claimant, TC Development is a project management services provider, and the second claimant, to which I shall refer as BUJ, is a firm of architects.

2. The client is the first defendant, Investin Quay House Limited. Both claimants provided services to the defendant for and in furtherance of an anticipated application for planning permission in relation to a property owned by the defendant at Quay House, 2 Admirals Way, London E14.

3. The evidence shows that it had been acquired by the first defendant in a total sum of around £13 million. Although the application for planning permission was well advanced, and extended to pre-application meetings from the local planning authority, Tower Hamlets, which led to a favourable pre-application response from the council, the planning application was not formally submitted and the property was sold for a considerable profit by the defendant in about July 2018. This trial is all about the entitlement of the claimants to fees, by way of debt or alternatively damages representing relevant fees, arising in those circumstances.

4. The reason why this matter can be taken shortly is the procedural history of the matter. The claim was originally defended by the defendant, and there was a counter-claim alleging poor performance. However, the defendant failed to comply with an order for security for costs made by Mr Justice Stuart-Smith following a contested hearing on 10 June 2019. Because the security was not provided, the counter-claim, by virtue of the order, was immediately stayed, and the claimants would have liberty to apply to the court to strike out the counter-claim.

5. What then happened was that the defendant was in breach of a disclosure order, and the result of all that was that the defence itself was struck out. That was done partly by an order of Mrs Justice O'Farrell of 28 June. Then, pursuant to an order I made of an unless kind, in relation to disclosure, on 4 October, the unless order not having been complied with, it followed automatically that the defence was struck out as well. By this time, the defendant had ceased to engage in any way with this litigation.

6. There is simply the matter for me to consider whether the claimant has proved its case, on which I need to make findings. There is no one appearing before me today representing the defendant, which has been the history for some time.

7. The two claimants are unconnected, and they each had different contracts with the defendant. The first contract was of a relatively short and informal kind, but on its face it provided expressly for what happened, which was that the site was sold without planning permission having been granted. Indeed, as I said, it was never actually formally applied for.

8. The relevant term in the contract says that there would have been a fee of £500,000 had there been a favourable planning permission, with an uplift where more than 300 apartments were permitted, of £5,000 for each apartment. Secondly, and in the alternative, if Quay House was sold prior to the grant of planning permission, in particular if it was sold more than 12 months from the date of the TC contract, the first claimant would be entitled to a fee of £150,000.

9. That was the case here, because the TC contract was made on 12 January 2017. The property was sold around July 2018 and, therefore, the 12-month period is comfortably exceeded. On that basis, it is incontestable that the sum of £150,000 has fallen due.

10. A point raised by Mr McCreath is that if one looks at the TC contract, there is a provision for what is described as a flat fee in relation to all the different fee entitlements that could arise. Those fees are chargeable in respect of the services provided, and which were provided, in the relevant way by TC Development. On the face of it, with a flat fee for professional services, TC Development would fall liable to pay VAT thereon.

11. The question of interpretation arises as to whether the reference to a flat fee of £150,000 is inclusive or exclusive of VAT. Mr McCreath submits, and I agree with him, that it must obviously be the case that where it is a fee for professional services, in this context the VAT should be added.

12. I am fortified in that respect by the position in relation to the second claimant, where there was a much more formal contract, issued somewhat later, on 5 September 2017, but which provided for VAT to be added to all the various flat fees that were described in that contract. In my judgment, objectively speaking, the defendant clearly assumed an obligation to pay VAT in relation to the more informal contract.

13. That being the case, I have no difficulty in giving judgment to the first claimant for £150,000 plus VAT. All questions of interest I will deal with later.

14. The position in relation to is slightly less straightforward for this reason. The contract, which I have mentioned, was made on 5 September, and provides for a number of eventualities. First, there is a basic fee of £750,000 which would be payable on the grant of planning permission, as to which £250,000 was payable immediately and the balance on the sale of the property or in six months, whichever was the sooner, the contemplation of the parties being that while the defendant would obtain planning permission, it would not develop the property itself but would sell it on with the benefit of planning permission. There was an additional fee that I do not need to deal with, because it does not arise here.

15. The only other express clause dealing with fees was a termination clause which said that the defendant could terminate the agreement on 10 days' written notice, but in those circumstances clause 12 provided that there would be a fee payable to the second claimant if the agreement was terminated before 1 January 2018: £295,000 if it was terminated after that date but prior to the submission of a full planning application and £500,000 if it was terminated after such a submission. It is absolutely plain that that provision was designed to provide a fixed amount of compensation for the work done by the second claimant in circumstances where it would not be able to earn the other fees because the contract had been terminated before the grant of planning permission, which would trigger the other fee provisions to which I have referred.

16. To say a little more about what actually happened, I have heard today not only from Mr Chadda, who gave evidence in respect of the first claimant's claim, but from Mr Heaf in respect of the second claimant's claim. The position was that after the favourable meeting with the planning authority in April or May 2018, Mr Heaf, not having heard anything, chased the representative of the defendant, Mr Alford, to ask what was happening. Mr Alford said he wasn't sure, but thought that the property might be sold or might be about to be sold without the planning permission application having been granted. He said that he would chase up Mr John Downer, who is the sole shareholder in and director of the defendant company. Thereafter, Mr Heaf told me, there was silence.

17. In the light of that silence, as Mr Heaf told me, he took the view, effectively, that the contract had come to an end, and that his services were being dispensed with, as there was no sign of a planning permission and he had been told the property might be sold. What he then decided – I do not have a copy of the invoice in front of me, but it matters not – was to invoice the defendant for £295,000, as if the defendant had formally terminated on the basis of the clause 11 notice, although formal written notice had not been given.

18. That is all I need to say about the facts. The question then is how to characterise the second claimant's claim. It is put in a number of different ways. First, it is said that there was an obligation between the parties, it being what is now referred to as a relational contract – both parties having to work together to secure the ultimate benefit of planning permission, the architect on the one hand and the client on the other hand – and that that obligation of good faith would mandate the client to formally terminate if the decision had been taken to sell without planning permission, in order that the claimant could earn its termination fee.

19. The second way in which it is put is to say that there was an implied term of this contract, to the effect that if the client intended to terminate by virtue of selling the property prior to planning permission – because on that basis there could be no further employment of the second claimant – it must do so by using the designated form, which would trigger the payment of the fee.

20. There is an alternative claim, if all of that is wrong, on the basis of quantum meruit. For reasons I will explain, I do not get to that, but it is important to note that the evidence of Mr Heaf is that prior to the point when it was plain that they were not going to be asked to do any work, a considerable number of hours had been spent on the project by that point. The total hours are described as 6,892.5 which would, on a time-charge basis, have generated a fee of something in the region of £738,000. Indeed, a detailed

timesheet showing this is exhibited to Mr Heaf's witness statement. I say all of this lest there could be any impression from this judgment that BUJ was simply twiddling their thumbs.

21. In my judgment, the correct analysis is the second one proffered by Mr McCreath, which is that there is an implied term that if circumstances arise that mean that the termination of the contract is inevitable, because the property is sold, it is plain and obvious, or – to put it a different way – for reasons of business efficacy or necessity, that there should be such an implied term. If there was not such an implied term, the clear commercial basis for the contract could be avoided for no apparent good reason. In order to avoid that outcome, it is necessary for there to be such an implied term. This goes much further than something that would be nice or reasonable to have; it is absolutely necessary.

22. On that basis, there was a breach of the implied term, because the defendant did not serve the formal notice. The formal notice, had it been served, would generate the fee of £295,000, and therefore that would be the amount of damages payable.

23. There is another analysis which reaches the same conclusion, and it is, I think, the primary one, but it does not matter. It is that Mr Heaf, having sent an invoice for the £295,000, was clearly acting on the basis as if there had been a clause 11 written notice. The need for written notice is, at the very least, for the benefit of the party to whom the notice is served – in this case, the second claimant. It is up to the claimant to waive the notice requirement if appropriate. That, in effect, is what the second claimant did, and the result is that this court can treat the clause 11 notice as having been given, in which case the claim for £295,000 arises as a matter of debt.

24. If that analysis is wrong, the implied term would reach the same conclusion, albeit that, strictly speaking, the £295,000 would be receivable by way of damages. There may or may not be a slight difference in relation to interest, but that is something that can be dealt with hereafter.

25. For all those reasons, I award the sum of £150,000 to the first claimant, plus VAT, and the sum of £295,000, plus VAT, to the second claimant, either as a matter of debt or damages.

26. Having dealt with interest and awarded the sums to be set out in the order, I now have to make a further ruling about how to deal with two matters that arise from my judgment. The first is how and when I should deal with the principal application for costs, which is to be made by both claimants against the company defendant, both claimants now having won hands down against the defendant, and whether any part of that process should be adjourned.

27. The second question is what should be done about the fact that there is an application for a non-party costs order against the sole shareholder and, at one stage at least, sole director of the company, Mr Downer. Points have been taken about service on Mr Downer recently to join him as a party for that purpose. Ms Clarke has sensibly informed me that no point is going to be taken on that so as to delay matters. The real question is a timetable for the third-party costs matter. She also asks me to adjourn the main costs.

28. It is true that the assessment of the main costs would form the starting point for any costs order to be made against Mr Downer, if the court decided that a third-party costs order was appropriate. However, in my judgment, it is absolutely plain from the history of this matter is that the claimants will recover their costs in principle from the defendants. There is, in my judgment, no conceivable basis for preventing that order from being made. There is no reason in principle why I should not deal with that matter today.

29. As it so happens, I am not being asked to make a summary assessment of the claimants' costs, which would have the effect that the costs had been determined, as far as quantum is concerned, once and for all. The only thing I am going to be asked today, on the assumption that costs should be payable in principle, is that I make an interim payment order, and I can take account of whatever contingencies I want, so far as that is concerned.

30. I do not think there is anything at all in the point, in so far as it affects when I hear the main costs application, that it is possible that this claim might have been defended or treated in a different way if it was thought that Mr Downer might face a third-party costs order. There is something of an issue at the moment about whether he was given notice of that anyway. The claimants say that he was, and Ms Clarke, understandably because of her late instructions, simply is not in a position to deal with that. In a situation like this, it is absurd to suggest that a properly advised sole shareholder of a company, in the position of Mr Downer, should not appreciate what might happen after a judgment is given against the company. It is not a reason for me to adjourn the main costs matter, so I am going to deal with that now.

31. I am not going to deal with the making of a third-party costs order against Mr Downer. Mr McCreath does not urge me to do so. That must be right. The only question there is a question of timing. The claimants' principal evidence has gone in. It is to the effect that when one looks at the evidence that came from Mr Whale for the defendant, of the money coming in from Mr Downer and then going out to Mr Downer from the company, so that the company was left with barely any assets at the time of the injunction, the claimants say there is an irresistible inference that the entire matter was funded by Mr Downer, which is a good starting-point for a third-party costs order.

32. Mr Downer is in a position now to deal with that argument. He does not need to wait for any evidence about it and he can get on with providing his evidence in response. The only slight fly in the ointment is the question of prior notification of an intention to seek a third-party costs order. So far as that is concerned, I am told that there was certainly an email sent to that effect before a case management conference in June, and that it may be the case that the skeleton argument provided for the claimants for that hearing also made reference to it.

33. It is right that the claimants should provide those documents to Mr Downer, even if they say he has already had them, and I am going to make an order that, so far as that email and that skeleton argument are concerned, copies should be provided by midday next Tuesday to those now acting for Mr Downer. It is simply a matter of retrieving them, so it shouldn't take any time at all.

34. The more problematic matter is the question of the transcript, as to whether anything was actually said at the time of the case management conference or not. So far as that

is concerned, I am going to make an order that the relevant part of the transcript is provided by 4 pm next Friday, 22 November.

35. I do not believe that Mr Downer will have any difficulty at all in the general grounds of opposition that he wishes to make to the third-party costs order. He is in a position to get on with that right now. The underlying fact, so far as the payments are concerned, is that there may not be much more to say about those as opposed to what inferences should be drawn, because the evidence about that came from his side, and the company's side, in the first place.

36. As to the extent to which he was apprised of what was going on in the hearing in June, when he was one of three directors, I am told, but still the sole shareholder, again, in general terms, Mr Downer can get on with that now. He will know perfectly well what he was told about the hearings, what communications he had with the direct access counsel at the time, what instructions he gave and what he was told afterwards. There is nothing that needs to be delayed as far as that is concerned. The only point is whether there was in fact evidence from the transcript as to what was said.

37. In my judgment, provided that is given within a week's time – the claimants will have to move swiftly on this – I see no reason at all why Mr Downer should not provide his evidence in reply two weeks from today. That will take us to 29 November. I will then give the claimants seven days to put evidence in reply, which will take us to 6 December. I will list this matter for two hours on Friday 13 December. I do not consider it needs any more. It is not reserved to me; it may go to someone else.

38. That is the procedural timetable so far as the making of the third-party costs order, or not, is concerned. That simply leaves the question of the costs as against the defendant.

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