

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2021] EWHC 2353 (TCC)



No. HT-2019-000112

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 27 July 2021

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

ELAINE NAYLOR & 10 ORS

Claimants

- and -

(1) ROAMQUEST LIMITED
(2) GALLIARD HOMES LIMITED

Defendants

MS S. MIRCHANDANI QC appeared on behalf of the Claimants.

MISS D. RAWLEY QC appeared on behalf of the Defendants.

J U D G M E N T

(Via MS Teams)

(Please note this transcript has been prepared without the aid of documentation)

MRS JUSTICE O'FARRELL:

- 1 This is an application by the claimants in this matter, Naylor and others, for permission to conduct intrusive inspections of the facades of a number of buildings at New Capital Quay in Greenwich, London.
- 2 The background facts can be summarised briefly for today's purposes. The claimants' claim arises out of a mixed residential and commercial development which comprises eleven tower blocks at New Capital Quay. The claims are limited to six of those tower blocks. The claimants are leasehold owners of one or more of the flats in the relevant six tower blocks. The first defendant, Roamquest, was the developer and freehold owner of the property. The second defendant, Galliard, carried out the design and construction of the development. The development was carried out between 2009 and 2014.
- 3 Following the Grenfell Tower fire in June 2017, the Building Research Establishment carried out testing on the external envelope of the development. That testing disclosed that there were difficulties in terms of fire protection and that the properties, therefore, failed to comply with the applicable building regulations. The claimants have the benefit of an NHBC Buildmark policy in respect of their flats. The NHBC accepted the claim under the policy and, from about 2018/2019 until recently in 2021, remedial works have been carried out including replacement of the cladding, insulation, and cavity barriers. It is in relation to those remedial works that the current claim was made.
- 4 Initially, the claim was by about 124 claimants, leasehold owners of 82 of the flats, claiming their uninsured losses in respect of an increase in their building insurance premiums, lost rental income, alternative accommodation costs, and general damages. Subsequently, the claimants made a further claim in respect of additional defects that it alleged would remain present in the buildings following the remedial works.
- 5 The original claim form was issued on 2 April 2019. On 30 July 2019, this matter came before Fraser J on an application for an extension of time for service of the claim form and preparation of the particulars of claim. An extension of time was granted.
- 6 The matter next came back before the court on 13 December 2019, in front of Ms Joanna Smith QC (as she then was) sitting as a Deputy High Court Judge in the TCC, for a further extension of time. The Judge on that occasion granted a further extension of time, noting that it was the second extension of time that the court had granted. The Judge also referred to a dispute that had arisen between the parties, as to whether appropriate disclosure had been given and the adequacy of inspections that had been carried out in the past.
- 7 In particular, at paragraph 7 of the judgment, the learned judge stated that:

“It appears to me that, by and large, the defendants have taken steps properly to cooperate with the claimants' requests for documentation, to assist the claimants' experts in understanding that documentation, and to offer opportunities for inspection of the development. Indeed, the defendants made it clear that, by way of a letter dated 14 November 2019, they remained prepared to permit the claimants'

experts appropriate access to inspect the development and to see remedial works that are being carried out there. The claimants' experts have, in fact, chosen not to take up this offer and I was told that they do not consider that any further inspections of the development are required prior to particularisation of the claimants' case in the particulars of claim."

- 8 The claimants were given additional time to prepare their pleaded case. They did so.
- 9 The matter came back before this court on 20 November 2020 on the defendants' application to strikeout parts of the claim, or for summary judgment in respect of those parts, namely the alleged defects claim. The defendants submitted that the statement of case disclosed no reasonable grounds for bringing the claims, they had no real prospect of success and there was no other compelling reason for a trial.
- 10 The Court heard counsel for the parties over the course of that day and received further submissions from the parties following the hearing. On 10 March 2021 the Court handed down judgment, accepting the complaints made by the defendants as to the adequacy of the pleading but adjourning the strikeout application to today's date in order to give the claimants an opportunity to amend their pleaded case and rectify the deficiencies.
- 11 On 22 April 2021, the Court issued a further order in this case, having noted that the parties were unable to agree any further directions for the case to proceed and had failed to fix a date for a consequential hearing. The Court ordered that if the claimant intended to apply for permission to amend its particulars of claim to address the matters raised by the defendants in their strikeout application, such draft amendments must be filed and served on the defendants by 25 June 2021, together with any further evidence relied on. There was provision for the defendants to provide evidence in response and for the parties then to be ready to attend the adjourned hearing on 27 July 2021, today's date.
- 12 Unfortunately, there is, as yet, no proposed amended pleading and none of the timetabled directions issued by this Court have been complied with.
- 13 On 11 May 2021, the claimants issued an application seeking an order from the Court varying the order of 22 April to include provision for intrusive investigations of the tower blocks before the revised pleading could be prepared.
- 14 On 21 June 2021, a further application was issued by the claimants seeking the orders that are before the Court today, namely for specific intrusive investigations to be carried out to the tower blocks.
- 15 The current application by the claimants is based upon the proposals by Mr Boucher, the expert retained by the claimants. Initially, his proposals were set out in a note dated 6 April 2021. Having considered comments made by the defendants, Mr Bucher has now prepared revised proposals that are set out in a revised document dated 1 July 2021.
- 16 Ms Mirchandani QC, leading counsel for the claimants, submits that it is necessary for the claimants to carry out further intrusive investigations into the tower blocks in order to properly plead a case on defects for the purposes of this claim. The dispute between the parties up concerns both the replacement aluminium cladding (replaced as part of the remedial works) and the retained elements. In respect of the replacement cladding, the allegations are that the elements surrounding and behind the cladding retain combustible components that therefore do not meet building regulations. There is also an allegation that

the workmanship might not be in compliance with the specified details and/or manufacturer's details.

- 17 In relation to the retained elements, the allegations are, again, workmanship defects, retained combustible materials, and a suspicion of widespread defects throughout the development. In particular, the claimants rely upon the fact that the new replacement cladding design was based on a fire engineering-based decision which retained some of the elements about which the claimants are concerned. Reports that have been disclosed to date by the defendants, including the Meinhardt inspections, show that there were certain installation defects in the original works that claimants fear will have been replicated throughout the property in the retained elements and included in the replacement works.
- 18 Miss Rawley QC, leading counsel for the defendants, submits that it is not necessary for intrusive investigations to be carried out. The defendants' position is that the potential defects raised are, in truth, design matters insofar as they have been articulated, in respect of which the claimants already have sufficient information to amend their pleadings, if they so wish, without the need for further intrusive investigations. Further, the defendants' position is that the request to open up the retained elements is a fishing expedition that is based on pure speculation as to which there is no supporting evidence, whether from factual witnesses or based on the evidenced evidence of condition of the building, or based on expert evidence.
- 19 For that reason, the defendants' position is that no further inspections of an intrusive nature are required. However, the defendants maintain their earlier offer to permit some inspections behind the new aluminium cladding panels which can simply be demounted to facilitate an inspection provided that the inspections are kept to a reasonable level, the investigation works are carried out by the second defendant, and the claimants bear the cost of the proposed investigation.
- 20 The Court has power to order inspections of buildings, prior to the commencement of proceedings, or by way of an interim remedy during proceedings pursuant to CPR 25(1)(c)(ii). In this case, the Court bears in mind the following matters when considering what, if any, order to make in this case.
- 21 Firstly, remedial works have been ongoing to these tower blocks for over two years. During that time, there have been plenty of opportunities for the claimants and their experts to undertake inspections, whether of an intrusive nature or otherwise, and in the event of any refusal by the defendants to permit their required inspections to bring the matter back before the court. Despite that, no application was made to the Court and no firm proposal for intrusive inspections was produced until April 2021. Unfortunately, the remedial works have now all been concluded. Therefore, any further investigations into the replacement cladding works, at least, will require those new works to be reopened to facilitate any further inspections.
- 22 Secondly, the Court bears in mind that these tower blocks are occupied by tenants. Therefore, it is not a straightforward exercise for the parties, even if in agreement, to simply turn up with a few cherry pickers and start to dismantle panels and/or brickwork from the buildings. There are clearly issues of notice, safety measures, and consideration of the position of the tenants to be taken into account. It is a material factor that those tenants have already had to suffer more than two years of building works.

- 23 Thirdly, the Court takes into account that there is a risk of damage to the buildings if the claimants are permitted to go ahead and dismantle parts of the brickwork, insulation, and other materials sitting behind it.
- 24 Fourthly, the Court is mindful of the fact that any inspections that are to be carried out will require a full risk assessment and detailed method statements to ensure that they are carried out safely and with minimum inconvenience to the residents.
- 25 Finally, the Court is concerned that, in accordance with the overriding objective, any inspections or opening up carried out should be reasonable and proportionate in all the circumstances.
- 26 I turn then to the replacement cladding. The current proposal is for that cladding to be removed from various locations in a number of the blocks amounting to twelve different locations. The defendants' position, as submitted by Ms Rawley, is that these inspections are not required, firstly, because the ALUCOBOND cladding with the K15 backing has all been removed and replaced with a new system. The allegations currently made by the claimants in relation to the backing wall and window supports is, in fact, that there are retained combustible materials within the external wall construction. To the extent that the claimants wish to pursue that allegation, the defendants submit that they have all the information they need. There is no dispute as to the materials that have been removed and those that have been retained. The various technical specification documents either have been, or can be, provided to the claimants. Therefore, there is no need for any intrusive inspection in respect of those elements. They will turn upon expert opinion.
- 27 Further, the claimants wish to inspect to determine whether there has been poor workmanship in respect of the cavity barriers and rain screen cladding. The defendants dispute the need to carry out further inspections, firstly, because the claimants have had plenty of opportunities to carry out such inspections over the course of the last two years whilst the remedial works were being undertaken, and, further, that the primary allegation appears to be one directed at design, again, something that does not require intrusive inspections to determine. However, the defendants are content that the claimants should have an opportunity to inspect the cavity barrier installations in order to verify their design concerns and their installation concerns.
- 28 It seems to the Court that that is a reasonable stance for the defendants to take. To the extent that the claimants are making allegations of design, or allegations in respect of retained materials, on the basis that there is no dispute as to what the design is and what the retained materials are, there is no need to have any opening up in order to confirm what is common ground between the parties. However, given that the aluminium panels can be demounted to facilitate an inspection with relatively little inconvenience or risk to the buildings or the residents, it seems to me to be a reasonable step to undertake given that the claimants have concerns as to the precise method and standard of workmanship. Therefore, the Court will permit intrusive inspections in respect of the new replacement cladding but it will be limited to twelve panels in locations of the claimants' selection.
- 29 Turning then to the retained elements, the claimants' position is that they have a suspicion that there are defects in the retained elements based on evidence, including photographic evidence, of defects in the cladding that has been removed. In response, the defendants' position is that insofar as the claimants wish to make allegations regarding retained components that are said to be combustible or design that is said to be in breach of the building regulations, that is something that does not require an intrusive investigation. Insofar as there are allegations of defective workmanship, this is based on pure speculation.

There is no independent evidence as to any existing defects in the retained elements that would justify widespread opening up that has the potential to damage the buildings in the process.

- 30 The starting point for the Court is that the claimants, back in 2019, were given the full O&M file in respect of the construction. Therefore, they have had plenty of opportunity to identify and request an inspection, or opening up, if that be the right course, in respect of any part of the works about which they have suspicions as to the adequacy of workmanship. Further, the Court is not satisfied that it has been shown any evidence of defective work in the retained areas.
- 31 Ms Rawley, during the hearing, provided the court with information that the cladding works and the other works were carried out by different subcontractors. That is not surprising on a construction project of this kind. I bear in mind that Ms Mirchandani has not had a proper opportunity to take instructions and respond to this but it serves to highlight the absence of evidence from the claimants, setting out their case that the workmanship must be faulty in respect of the retained elements. The Court was taken to photographs in the Meinhardt reports but those were dealing with the cladding works that have now been replaced. Therefore, they do not provide any evidence of the workmanship defects, if any, in respect of the other, different, retained elements. It is for the claimants to show good reason why the Court should order the buildings to be dismantled in parts so as to enable the claimants to carry out inspections in a case that has been ongoing for more than two years. The court is not satisfied that any good reason has been put forward for such additional intrusive inspections. Therefore, that part of the application is refused.
- 32 For those reasons, the Court will order that the defendants shall permit an intrusive inspection in respect of twelve aluminium panels in locations of the claimants' selection, that proposal to include a detailed draft risk assessment and method statement produced by the claimants, setting out exactly what it is they would like to be undertaken by way of the inspections. The inspections themselves shall be carried out by Galliard. The reason for that is that they are responsible for the buildings and they are in the best position to determine an appropriate, safe, and convenient approach to the works that are then required.
- 33 In terms of revised directions:
- i) the amended particulars of claim and any evidence served in support of an application to amend shall be filed and served by 4pm on 29 October 2021;
 - ii) the defendants shall serve any evidence in reply by 4pm on 19 November 2021;
 - iii) the adjourned strikeout and CCMC shall come back before the Court on 10 December 2021.

The reason that I am going to order a CCMC to take place on the same date as the resumed strikeout application is because even if the Court were to strikeout the defects claim, there are, of course, other claims that are not the subject of any ongoing strikeout application which need to be case managed in any event.

- 34 In terms of the costs of the inspections, the claimants have accepted that they should bear the costs of the inspections. The Court it is not going to limit the costs that should be incurred. The Court does not have the material before it in order to make such a determination. The Court will order the claimants to make an on account payment of those costs in the sum of

£20,000. The reason for the reduced figure is the reduced amount of investigation work that is being ordered.

35 Before anyone says anything else about costs, the court is minded to reserve the costs of the application; that simply leaves the costs of today.

MS MIRCHANDANI: My Lady, can I just clarify one point on the costs? You are saying that the court will not limit the costs to be incurred.

MRS JUSTICE O'FARRELL: Yes.

MS MIRCHANDANI: That gives rise to, of course, concern for the claimants because of the quotes that we have faced previously and, effectively, we are now looking at a revised site investigation. Can there be provision for a mechanism for those costs to come back before the court to be assessed? I think my learned friend agreed that they could be subject to detailed assessment, some sort of----

MRS JUSTICE O'FARRELL: Yes, detailed assessment if not agreed.

MS MIRCHANDANI: And that---- That---- Can I just check? I know this may seem facile but can the court---- Does the costs judge have the ability to assess those kind of construction costs in the detailed assessment process?

MRS JUSTICE O'FARRELL: Well, we -- we will have to look at that when we get there. It is 5 to 2 and I have got other people waiting.

MS MIRCHANDANI: I do understand. The -- the costs of the original strikeout application you are minded to reserve. Did you wish to----

MRS JUSTICE O'FARRELL: That has already been reserved.

L A T E R

36 I will reserve the costs of the application, and the costs of the strikeout application have already been reserved. However, in terms of the costs of today, the defendants should have their costs of today, such costs to be subject to a summary assessment if not agreed.

CERTIFICATE

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This transcript has been approved by the Judge.