HT-2020-000176

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 573 (TCC)

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

Friday, 12 February 2021

BEFORE:

MRS JUSTICE JEFFORD

BETWEEN:

ADVANCED CONTROL SYSTEMS, INC

Claimant

- and -

EFACEC ENGENHARIA E SISTEMAS SA

Defendant

MR S ORAM (instructed by ONTIER LLP) appeared on behalf of the Claimant

MR G SHIRAZI (instructed by Penningtons Manches Cooper LLP) appeared on behalf of the Defendant

----

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

1. MRS JUSTICE JEFFORD: This is an application by the claimant ("ACS") to strike out a number of paragraphs of the defendant's Defence and Counterclaim, namely paragraphs 25 to 65, 72 to 74 and 76 to 81. Alternatively there is an application for full and proper responses to a Part 18 Request dated 15 September 2020, albeit accompanied by a repetition of the application for paragraphs to be struck out.

Background

2. The background to this matter is a project in Bangalore, India, to improve the electrical power distribution system in that city. The defendant, Efacec, was the main contractor in respect of package 1 of these works. The employer was the Bangalore Electricity Supply Company ("BESCOM"). Package 1 compromised a computer system, the Distribution Automation System ("the DAS"), to receive and monitor inputs from switches and inputs across the network and provide real-time observation of the state of the network and then, through the distribution management system, issue commands to operate the network. It was to be controlled from two physical control centres and the package also included a communications system which linked the two control systems and other parts of the system and network.

3. From March 2014, the claimant, ACS was a subcontractor to Efacec in respect of the DAS part of those works. There is a background in which ACS had formerly been part of the corporate structure of the defendant, but that matter is not material to the issues that arise on this application.

Pleadings

4. The claimant's claim is for the payment of substantial sums of money which it says remain outstanding on this project, those sums amounting to approximately $1.7 million. The Defence and Counterclaim was served on 4 September 2020.

5. The structure of the Defence and Counterclaim is relevant to this application. Section A sets out an overview of the case and the parties. Section B sets out the project and the subcontract provisions. Section C is then headed "The claimant's poor performance

and repeated breaches of the project". By way of example only, section C.1 covers the period March 2014 to December 2016. At paragraph 25 it is alleged:

> "Throughout this period, the Claimant failed adequately to resource the project with sufficient or sufficiently competent staff, to properly coordinate or manage its staff, adequately to interface with BESCOM, to progress the project or to comply with the project schedule. The documentary and software deliverables produced by the Claimant were late and of a low quality, with more errors and omissions than would be expected of competently produced documents and software. Further, the Claimant failed adequately to interface with, or gather requirements from, the BESCOM staff that were undertaking OJT [on-the-job training] with the consequence that the Claimant's development work contained a number of business process errors that would not be caught until later in the project."

That is very much a basket pleading with all manner of allegations of inadequacies on the part of the claimant thrown into the basket.

6. Paragraph 26 becomes a little more specific and alleges that the claimant was due to submit its factory acceptance testing (“FAT”) procedures on 24 June 2014; that it was late; that when the procedures were produced they were of low quality and did not comply with the technical specifications, or did not address project-specific requirements or did not sufficiently demonstrate system compliance; and that the document failed to explain the testing in sufficient detail that the procedures could be adequately understood for the purposes of implementation. It is alleged that BESCOM sent the claimant its comments on the procedures and instructions to resubmit compliant procedures.

7. As the pleading continues in respect of this and later periods, there are similar specific allegations that relate to particular documents or testing procedures or deliverables under the subcontract. Most, if not all, of them are, however, framed in similar terms without any condescension to particularity of the respects in which, to take paragraph 26 as an example, there was non-compliance with the technical specification or insufficiency in the test procedure.

8. The more general paragraph 25 that I have already recited appears in similar terms at further points throughout the defence, for example, at paragraph 38, where the same allegation is made in respect of a further period of the project. I do not propose to recite the whole of the defence for the purposes of this judgment, but that is in broad terms the structure of the way in which the defence is pleaded, with a narrative covering the whole period of the project and, at appropriate junctures or at the start of particular periods, that sort of basket allegation is made and then some further detail of the matters that might have been put into the basket is set out.

9. The defendant's case as to the claimant's claims for payment is set out in section F. It is denied the sums claimed are due. In part in defence to payment it is alleged that there was a change in the basis of payment from "pay when paid" to "pay in any event", if I can put it that way, but that that was brought about by economic duress.

10. The Counterclaim then repeats the entirety of the Defence. It then alleges, at section G, breaches by the claimant. Paragraph 90 states:

> "Throughout the project, the Claimant was in breach of its contractual obligations under the subcontract. The Claimant had failed to achieve Milestones on time, failed to deliver a contractually compliant system, failed to deliver the required training and failed to perform the subcontract with reasonable care and skill."

Particulars of breach are purportedly set out at paragraphs 90.1 to 90.16 . In each instance, however, the particulars are essentially a simple assertion that the claimant failed to do something (for example, adequately to resource the project or to produce project documents with reasonable care and skill) and that that was in breach of terms of the subcontract. There is no further particularisation in any instance of those failings, and the documents, project deliverables or whatever it may be, to which they related.

11. The claim for loss and damage is set out at section H. It is alleged that, as a result of the claimant's breaches of the subcontract, the defendant has suffered loss and damage to be assessed but estimated in excess of $16 million, plus a sum in excess of 28 million Indian Rupees. The particulars of loss are said to be, firstly, that by reason

of or in mitigation of the claimant's persistent and extensive breaches of the agreement, the defendant incurred management consultancy and other costs that it would not have incurred if the claimant had complied with its contractual obligations. The case as to causation is barely more detailed than that. The estimated sums claimed are set out. There are a number of separate and smaller claims in respect of failure to complete the works, failure to renew warranties, and so forth. Finally there is another very substantial claim for $9 million which is said to result from the claimant's ongoing failure to complete the outstanding works under the project or to carry out the warranty works. I observe at that point that it is quite clear from the way in which that is pleaded that what the defendant was saying was that the multitudinous breaches of the subcontract which were alleged generally in paragraph 90 were said to have led, at least, to the claim for $16 million and 28 million Indian Rupees in what might loosely be referred to as a global claim.

12. So far as the paragraphs of the Defence (paragraphs 1 to 88 and in particular those to which this application relates) are concerned, Mr Shirazi on behalf of Efacec has submitted that these paragraphs go to the defence as well as the counterclaim because they are relevant to the defendant's case that it found itself in a position where it could be subjected to economic duress. He accepts that they are more fully pleaded than might otherwise have been the case for these purposes, but that, he says, is because the intention was that they would also be relied upon in the Counterclaim. This is not, he submits, a case in which individual breaches - for example, a particular failure of a particular document to address a particular requirement of a technical specification - leads to a particular loss. This is simply not that type of case. Rather, Mr Shirazi submits, the nature of the defendant's case against the claimant is that the claimant's performance was poor and inadequate - to use his term it was rubbish - and the rubbish performance led to the losses which the defendant claims. Those losses, he says, are for disruption and prolongation, albeit in the same amount, and replacement of the entire system, together with the smaller claims that I have referred to. I have to say that that itself is not at all apparent from the pleading as it stands and from the structure I have briefly gone through.

Part 18 Request

13. Perhaps unsurprisingly, that pleading provoked a Part 18 Request on 15 September 2020. It was not, as it might have been, an extremely lengthy and wide-ranging request. It was, on the contrary, carefully formulated and focused and. So far as the allegations of breach were concerned, it was restricted to paragraphs 90.6, 90.7, 90.8 (together with 90.15), 90.9 and 90.11; paragraphs 90 and 91 generally(but limited to seeking confirmation that the allegations of negligence were supported by expert evidence); and paragraph 92 (particulars of loss). Some of those requests, Mr Oram rightly submits, went in effect wholly unanswered.

14. It is instructive to look at the introduction to the Reply to the Request for Further Information. That contends that the Request largely requests information which has already been provided and particularised in the Defence and Counterclaim, and then it continues:

> "Further, given the number of defaults by the Claimant over an extended period of time, the Defendant adopted a reasonable and proportionate approach to pleading those defaults and it would not be proportionate to plead in microscopic detail. The Claimant is also aware of the details relied upon by the Defendant because it participated in all relevant meetings and received the relevant contemporaneous correspondence on the project."

That theme - that the claimant knows the case against it- was repeated throughout the replies to the requests in relation to the sub-paragraphs in paragraph 90. It does not at all take account of the fact that, whilst the claimant may have known what complaints were are being made against it at the time of the project, it does not follow that the claimant knows what complaints are being made against it and relied upon in these proceedings, and it certainly does not follow that the court knows what complaints are being made and relied upon against the claimant.

15. Further correspondence followed and, following the issue of this application in November 2020, resulted in a letter from the defendant's solicitors dated 18 December. In that letter they responded to the application and set out their position in respect of the application, amongst other things doubting that there was any utility in the

application. They made the point that since the application was to strike out paragraphs of the Defence but not the pleadings of breach, if those paragraphs were struck out, that would leave the pleadings of breach unaffected. As Mr Oram has accepted or explained on this application, it is right that the effect would be that the defendant was then limited to highly generalised allegations of breach without any attempt at particularisation at all, but he would doubtless have something to say about that in due course and in respect of any case management directions to be given in this matter.

16. In any event, at paragraph 4 of the letter of 18 December 2020, the defendant's solicitors provided a helpful schedule. They took each one of the breach allegations in paragraph 90 in one column and they indicated in the next column the paragraphs of the narrative in the Defence that were relied upon in support of that breach allegation. That had the effect of providing some degree of further information, but it meant also, as Mr Oram submits, that in order to understand what particulars were relied on in respect of any alleged breach, one had to visit, in some instances, ten or more paragraphs of the Defence and knit the pleading together. It is the sort of exercise that Kerr J referred to as "foraging" for the allegations in his decision in *Standard Life Assurance v Gleeds* [2020] EWHC 3419 (TCC).

17. The problem in this case is that when one undertakes that foraging exercise there is still more foraging to be done. To take just one example, a number of the allegations take one back to paragraphs 25 and 26 of the Defence which were in the general terms which I have already indicated. Similar issues arose, as I was taken to in the course of the hearing, in relation to paragraph 38. Those paragraphs particularly related to three of the major allegations, as it seems to the claimant, of poor quality project documents, the defective system and failure to renew licences, and failure to carry out testing in accordance with the subcontract. The end result is that the so-called particulars are to be found in paragraphs that cover multiple allegations, where there is a significant overlap between allegations, and where the paragraphs are in many instances wholly generalised. .

The application

18. That brings me to the substance of the application. Both parties have referred me to the decision of Kerr J in *Standard Life Assurance* to which I have already referred. In that decision he helpfully draws together the principles which should be applied to an application to strike out a pleading, and also those principles that apply to the manner in which the case ought to be pleaded. I have regard in particular to what he says at paragraph 96 of that judgment but I do not intend to set that paragraph out in detail in the course of this judgment. What I do draw attention to is the following subparagraphs. At sub-paragraph 8 he rightly says that a claimant may plead primary facts and invite inferences of negligence or causation of loss to be drawn from proof of them, but a court considering whether to draw the inferences will consider any rebuttal evidence. It is if, but only if, the court could not reasonably draw the inferences necessary for liability, even without such rebuttal evidence, that the case is likely to be suitable for summary disposal by striking out or summary judgment. At sub-paragraph 10 he notes that extrapolation by sampling may be an appropriate method of persuading a court to draw such inferences, and at sub-paragraph 12 he again rightly says that a global claim attributing a party's losses to another's breach of duty without strict attribution of individual items to specific causes is permissible in principle subject to proof and particular evidential issues.

19. Against the background of the nature of this case, the structure of the pleading and those principles, I am satisfied that the paragraphs which it is sought to strike out and the narrative in the Defence serve a proper purpose in this case and in this pleading and should not be struck out. The narrative conveys the nature of the defendant's case as to poor performance and the consequences in the context of the progress of the project. It is not so vague or incoherent that it falls within the principles on which the court's jurisdiction to strike out ought to be exercised, nor is it in any sense abusive. There is in broad principle merit in Mr Shirazi's submission that the pleading of this or any case should be proportionate, and that it is not necessarily the case that he needs to plead each and every instance of breach in minute detail in order to make good his case as to the claimant's poor performance and the consequences of that poor performance. He may do so by pleading sufficient matters from which the court can draw inferences, by some form of extrapolation (such as a sampling exercise) and by pleading the sort of

global claim the nature of which was briefly summarised in the quotation from *Standard Life* to which I have referred.

20. However, as it is currently set out, I do not consider that the Counterclaim, with its references back to the Defence, as indicated either by the Reply to Request for Further Information or the solicitors' letter of 18 December 2020, provides anything like adequate particularisation of the defendant's case either for the purposes of proper case management or trial. It does not even start to set out a case from which the appropriate inferences could be drawn. The question for me then is whether the right course at this stage is to strike that case out or those paragraphs out, or to require them to be properly particularised. That is a question of fact and degree and judgment and it seems to me, not least having heard the arguments this morning, that there is sufficient in the Defence to mean that the strike out course is not the appropriate one, and that the defendants having an opportunity to make good their case—in a manner which enables proper case management—is the more appropriate course.

21. The hearing itself has demonstrated that further explanations of the defendant's case may be forthcoming. For example, Mr Shirazi was able to identify a number of specific sources of particularisation of the lack of functionality of the system, which could be properly set out in some form of schedule with full particularisation, and enabling the claimant to know the case it has to meet, and the court to know the case it has to deal with. He has sought to explain the nature of the losses that are claimed and the causative link between them. I do not, frankly, claim to fully understand how the disruption claim is sought to be put or what the interlinkage is said to be between what appears in the main pleading to be a disruption claim and appears in the Further Information as a prolongation claim, but it is a matter that can be set out more properly and more fully.

22. Lastly, in his skeleton argument for this hearing and in the course of the hearing Mr Shirazi has indicated (although this was the first time the suggestion has come from the defendants), that an appropriate course might be a sampling exercise. As I observed when that submission was made, at the moment there is not even anything from which one could take the sample or form a view as to what should be sampled, but quite clearly there could be.

23. Accordingly, as I have already indicated to the parties, in my view the appropriate course here is for the defendant to replead the Counterclaim providing appropriate particulars. I have indicated to the parties the nature of that pleading and the particulars that should be provided, and I invite counsel in the normal way to draw up the order that reflects that. That should narrow the issues for the future case management conference in terms of disclosure, budgeting, witness statements and experts' reports, none of which could sensibly and effectively be dealt with on the current pleaded case. If what sees the light of day in due course is still regarded as inadequate, no doubt the claimant will say so and the matter will be back before the court.

24. So far as the costs of this matter are concerned, Mr Shirazi has submitted that the claimant's application has failed because I have not struck out the paragraphs that were sought to be struck out. However, I have allowed that part of the application that sought further particularisation, and it is, to my mind, quite clear that this application would not have been before the court had it not been for the inadequacy of the pleading of the counterclaim. Further, the application could have served a useful function in promoting agreement as to the further information that should be provided but, in the event, it needed to come before the court to be elicit any further explanation of the defendants' case and to be disposed of. Therefore the claimant will have its costs of this application.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk