IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

Case No. HT-2022-000293

Neutral Citation Number: [2024] EWHC 3573 (TCC)

Courtroom No. 27

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

Tuesday, 30th April 2024

Before:
DEPUTY HIGH COURT JUDGE ADRIAN WILLIAMSON KC

B E T W E E N:

HENDERSON & JONES LIMITED & ORS

and

GRANGE HEATING SERVICES LIMITED & ORS

MR P LAWRENCE KC and MR M GRANT (instructed by Cardium Law) appeared on behalf of the Claimants
MR J EVANS-TOVEY appeared on behalf of the First Defendant
NO APPEARANCE by or on behalf of the Second Defendant

JUDGMENT
(Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

DHCJ WILLIAMSON KC:

1. This is an application by the claimants to amend their particulars of claim. The proceedings arise out of a number of outbreaks of Legionella at The Feathers Hotel which is a well-known listed building in Ludlow. It is not, for the present purposes at any rate, in dispute that the first defendant, whom I will refer to as "Grange", was engaged in about 2015 or 2016 to carry out certain Legionella rectification works at the hotel and, sadly, despite those works being carried out, a number of guests contracted Legionella and either suffered injuries or died. I should say next that it is important to understand that the first claimant in this case is a funder and, therefore, brings these proceedings through some form of assignment. The second claimant and the third claimant are companies which were either owners or associated with the management of the hotel but are now both in liquidation.
2. The procedural history of this case is somewhat convoluted notwithstanding the fact that the first case management conference has not yet occurred. However, for the present purposes, it is probably sufficient to note that an order was made by Ms Buehrlen KC requiring the claimants to provide further information in relation to some requests which had been made and that order contemplated that a draft amended particulars of claim might be provided. It was, in due course, provided and a timetable was set for the hearing of this application.
3. Before I say any more about the proposed amendments, I should say that it is worth noting, as I pointed out to counsel, that important as this case is to the parties, it is in the scheme of cases in this court, relatively straightforward and relatively modest in quantum. I mention that because it seems to me that it is important to have regard to proportionality when dealing with this application to amend. The application was listed for one hour but subsequently, by agreement, extended to a day's hearing. It seems to me that if it can be dealt without injustice to the parties, it is important that these procedural issues be resolved so far as possible within the scope of the one day allowed.
4. With those principles in mind, I invited counsel to seek to identify issues of principle as compared to issues of detail which could be determined within the course of the one-day hearing, and as the parties will hear in a moment, certain issues were identified. It is obviously important that those issues of principle are dealt with after having had the benefit of full argument because it would be wrong, for example, to impose upon a defendant a new claim which is potentially barred by limitation through the backdoor, as it were, under the guise of an amendment. Where, however, as will be developed in a moment, a party is putting more flesh on existing claims, it seems to me that somewhat different considerations apply.
5. Having said all that, the principal intention of the claimants in this application is, they say, to focus more narrowly upon their real case. Their real case, they say, is that the defendants, or the first defendants at any rate, ought to have advised that it was not possible to guard sufficiently against the risks of Legionella by carrying out remedial works and rectification works. Rather, they should have been advised that it was necessary to remove and replace the hotel's existing plumbing system.
6. Against that background, I consider next the existing particulars of claim which are already in issue and to which the first defendant has already pleaded. At paragraph 17.1, it was asserted that there was an implied term of the contract between the parties that the first defendant, having designed and specified what was described as "a system upgrade" with the purpose of Legionella risk rectification and removal of the Legionella risk, that there was implied by common law, a term that those works would be fit for that purpose. It was then said at paragraph 42.3.8 that the current owner of the hotel, not the current claimants, had

addressed the Legionella issues by entirely removing and replacing the pre-existing plumbing system. It is said by way of an allegation of breach that the first defendant failed to recommend it should carry out this course of action.

7. I should say that the reference to "contract" is to exchanges of documentation between the parties mainly by email in 2013, 2015 and subsequently. Those documents are said to have given rise to a contract or contracts. It seems to me, pausing there, that although the case which is now sought to be advanced is not expressed with great detail or particularity, it is, nonetheless, asserted against the first defendant that they had an obligation to ensure that the design of the works was fit for purpose and they were in breach of that obligation to the extent that they failed to give the necessary advice about removal and replacement.
8. Turning then to the proposed amended particulars of claim, it is now set out at paragraph 42.3 in considerably more detail that such advice should have been given. In short, it is said that a radical solution should have been advised that it was necessary to remove and replace the plumbing system. In my judgment, that case was already advanced albeit with much less detail and particularity.
9. Against that background, I turn to the relevant law. Section 35 of the Limitation Act 1980 and CPR Part 17.4(2) provides that:

> "The Court may allow an amendment whose effect will be to add or substitute a new claim but only if the new claim arises out of the same facts or substantially the same facts as are already in issue in respect of which the party applying for permission has already claimed a remedy in the proceedings".

10. It is accepted on behalf of the claimants that it is reasonably arguable that the new case, if such it be, is sought to be advanced outside the applicable limitation period. Accordingly, the next question I have to consider is whether the proposed amendments seek to add or substitute a new cause of action. That issue was considered in *Co-Operative Group Limited v Birse Developments Limited* [2013] EWCA Civ 474 which said, not surprisingly, that the question is whether:

> "The essential factual elements in a cause of action already pleaded should be compared with the essential factual elements in the cause of action as proposed".

11. It seems to me that there are no new facts alleged in the proposed amended particulars of claim; rather the claimants are seeking, as it were, to put a somewhat different and more detailed spin upon the existing pleaded facts. I, therefore, conclude that there is no new cause of action. Mr Evans-Tovey who appears on behalf of the first defendant, when pressed on this point, sought to argue, as I understood his submissions, that there was implicitly a new set of facts relating to an analysis of previous design works pre-dating the relevant contract. However, that does not seem to me to amount to a new cause of action.
12. However, if I am wrong about that, I have to consider whether the facts are the same or substantially the same as those already in issue and, as the Court of Appeal pointed out in the leading authority of *Brickfield Properties Limited v Newton* [1971] 1 WLR 862, that does not require a complete overlap between the new and the old claims. It is a question of assessment as to the extent of the overlap. Furthermore, in *Welsh Development Agency v Redpath Dorman Long Limited* [1994] 1 WLR 1409, Glidewell LJ said this:

> "Whether or not a new cause of action arises out of substantially the same facts as that already pleaded is substantially a matter of impression".

13. My impression is that if there is a new cause of action, it arises out of substantially the same facts. There are the same negotiations and contractual documents. There is the

same performance. There is the same allegation as to what should and should not have happened.

14. Finally, I have to consider whether to exercise a discretion to allow the amendment. It seems to me that given that this is raised at a very early stage in the proceedings and given the close identification with the new and the old cases, that it is appropriate that I should exercise my discretion to permit these amendments.

15. Two other matters of principle were raised by the first defendant. The first relates to paragraph 44(a) of the amended particulars of claim which seeks to advance a plea of transferred loss in circumstances where it may otherwise be that there would be a so-called "black hole" where one party had the claim and the other party had the loss.

16. As was pointed out by Foxton J in *Palmali Shipping v Litasco SA* [2020] EWHC 2581 (Comm) at paragraphs 45 to 48, this area of the law is far from straightforward:

> 45. That principle, of uncertain scope, was first referred to in the House of Lords decision in *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85, [114-115], a case in which the developer of residential property was held entitled to recover damages from the contractor for the defective performance of the building contract which had caused loss to the owners and occupiers of the properties. The principle has been formulated on both a narrow and broad basis: i) The narrow basis (formulated by Lord Browne-Wilkinson at p.114) would confine the principle to cases where it was foreseeable that damage caused by breach of a contract relating to property would cause loss to a later owner of that property. ii) The broader basis would apply when one contracting party (B) has promised another (A) that it will confer a benefit on a third party (C) but does not do so. If A has a 'performance interest' in the performance of B's promise, A can recover damages in the amount of the cost of providing C with the promised benefit. This formulation of the principle was supported by Lord Griffiths in *Linden Gardens* (pp.96-97) and further explained by Lord Browne-Wilkinson in *Alfred McAlpine Construction Ltd v Panatown* Ltd [2001] 1 AC 518, 577.
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> 46. Mr Russell QC accepts that the narrower formulation of the transferred loss principle cannot assist Palmali, but he suggests that the broader formulation can. I accept that it would not be appropriate in the context of an amendment application to seek to resolve which analysis of the scope of the transferred loss principle is to be preferred or whether the two formulations co-exist, each with its own distinct requirements. The question is whether Palmali's claim is arguably capable of being brought within the scope of the broader ground.
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> 47. The boundaries of the broader approach to the principle of transferred loss were considered by the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32. Lord Sumption JSC (at [16]) restricted its application to cases where recognition of the contracting party's right to recover the third party's loss was necessary 'to give effect to the object of the transaction and to avoid a "legal black hole"'. He suggested that the rule would only apply where the 'known object' of the transaction was to benefit a third party or class of persons to whom the third party belonged, and the anticipated effects of the breach of contract would be to cause loss to that third party ([14]). Lord Mance

JSC referred to proponents of the broad principle as recognising that in some cases a contracting party may have a performance interest in the performance by its counterparty of an obligation to confer a benefit on or avoid a loss to a third party, but did not otherwise elaborate on the principle which he said could not conceivably be engaged on the facts of the case ([53-54]). Lord Neuberger PSC defined the principle of transferred loss as one applicable to transferred property ([102]). He referred to Lord Griffiths' wider formulation, which he said it was not necessary to address on the facts of the case ([106]).

48. In BV *Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises* Inc [2019] EWCA Civ 596, the Court of Appeal considered the transferred loss principle again. Coulson LJ at [75] held that the broader ground was limited to 'known object' cases:

'I have no hesitation in concluding that, as a matter of law, for a successful claim for transferred loss that seeks to rely on the so-called broader ground, as explained in *Linden Gardens* and *Panatown*, the claimant must show that, at the time the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged'".

17. Mr Evans-Tovey sought to argue, in effect, that the plea at paragraph 44(a) was not sustainable or at least, was not reasonably arguable. I do not agree. It does not seem to me that it is appropriate to a Court in such a difficult area of the law to shut out a proposed amendment at this stage where both the actual situation and the boundaries of the relevant law are unclear. However, I agree with Mr Evans-Tovey that the current pleading is not sufficiently precise and that the claimant should make clear upon which ground of the transferred loss principle they are relying; whether it is the narrower or the broader ground, and also the extent of the entitlement which they say arises therein.

18. Finally, as to matters of principle, my attention was directed to paragraph 44(b) of the particulars of claim which, in a sense, covers similar ground as to the potential situation that one of the second or third claimants may have the claim and the other the loss. In this paragraph, reliance is placed on the Contract (Rights of Third Parties Act) 1999. That Act provides that:

1:

(1) …a person who is not a party to a contract (a 'third party') may in his own right enforce the term of the contract if:

(a)…

(b) the term purports to confer a benefit on him…

(3) The third party must be identified in the contract (so far as relevant) by name, as a member of a class…".

19. The claimants say that both the second and the third claimants were identified as a member of a class because they held an economic interest in the hotel. As to this, Mr Evans-Tovey submits that the act cannot be interpreted so widely as that because it would allow shareholders, employees or perhaps even customers of a company to assert rights under the 1999 Act as third parties who might benefit from a contract made by the principal party. Again, it seems to me that this is a matter which can properly be pleaded. The 1999 Act, like the concept of a transferred loss, is not without its difficulties and it does not seem to me that answers can be provided authoritatively today as to what those sections intend or how those relate to the facts of the present case. However, it is, nonetheless, reasonably arguable, in my view, that the claimants can bring themselves within section 1. Again, I have some

sympathy with Mr Evans-Tovey's complaints about the impreciseness of the plea and, for those reasons, it seems to me that this plea should identify what term is sought to be enforced within the meaning of section 1(1) of the Act and what class is intended to be benefitted under section 1(3).

20. Accordingly, those are my decisions in relation to the matters of principle which have been put before me. I should then say that Mr Evans-Tovey on behalf of the first defendant put before me very extensive written submissions dealing with a host of other complaints about the proposed pleadings. For reasons which I explained in my short ruling given this morning, I came to the conclusion that that was not a proper skeleton argument and that permission should not be granted for a document of such length. Nonetheless, it is apparent that the first defendant has a considerable number of complaints about the way in which the claimants seek to plead their case. It was proposed on behalf of the first defendant that I should deal with this by, in effect, sending the claimants off to have another go at the particulars of claim having regard to what had been said by Mr Evans-Tovey and also to the preceding correspondence. It does not seem to me that this is an appropriate course because these proceedings do need to move forward and cannot be in a permanent vortex of amendment, application and particularisation.

21. I have been referred to a number of authorities in which the Court has considered what is the appropriate course to adopt where an existing claim is further particularised, amplified or developed. For example, HHJ Eyre QC, as he then was, in *Scott and Others v Singh* [2020] EWHC 1714 (Comm), paragraph 19 said that in that situation:

> "The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed".

22. It seems to me that in relation to the balance of the proposed amendments, these fall properly within that principle and so the proper course for the Court is to grant permission to amend but that is to be without prejudice to the right of the first defendant to apply to strike out or for summary judgment or for the determination of a preliminary issue as to the matters now proposed. I do not propose to go through all the proposed amendments but by way of example, complaint is made about the capacity in which a particular named person was acting. Was he acting on behalf of the second claimant, third claimant, both or none of them? Reference has been made to various correspondence which passed at the relevant time. However, that seems to me to be a point which potentially could be determined in advance at the trial by reference both to legal principle and to documentation. It may be that the first defendant, on mature reflection, considers that it is appropriate to apply to strike out or for summary judgment or for a preliminary issue. All of those options are open to the first defendant and, therefore, the first defendant is not prejudiced, in my judgment, by the order which I have indicated.

23. Accordingly, those are my decisions in relation to the application.

End of Judgment.

Transcript of a recording by Acolad UK Ltd
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