IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
TECHNOLOGY & CONSTRUCTION
COURT (QBD)

No. HT-2017-00262

[2018] EWHC 2210 (TCC)

Rolls Buildings
London EC4A 1NL

Tuesday, 24 July 2018

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

SWANSEA STADIUM MANAGEMENT CO LTD	Defendant/ Claimant
- and -	
(1) SWANSEA CITY & COUNTY COUNCIL (2) INTERSERVE CONSTRUCTION LTD (2018)	Applicants/ Respondents

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MR J. MORT QC and MR T. OWEN (instructed by Douglas-Jones Mercer Solicitors) appeared on behalf of the Defendant/Claimant.

MR R. HUSSAIN QC (instructed by Legal Services, Swansea) appeared on behalf of the First Applicant/First Respondent.

THE SECOND RESPONDENT did not appear and was not represented.

J U D G M E N T

MRS JUSTICE O'FARRELL:

1 The matter before the court is the first defendant's application:
(i) for part of the claim to be struck out for disclosing no reasonable grounds or for summary judgment against the claimant in respect of that part of the claim as having no reasonable prospect of success, alternatively;
(ii) for an order that the claimant provide particulars and clarification of its case.

2 The proceedings concern the design and construction of the Liberty Stadium in Swansea. The first defendant is the freehold owner of the stadium. The claimant is a special purpose vehicle leasehold owner and operator of the stadium for the benefit of the Swansea City Association Football Club Limited and, initially at least, also the South West Wales Rugby Club.

3 By a contract dated 17 June 2004, executed as a deed, the first defendant engaged the second defendant to carry out the design and construction of the stadium. The works were commenced some time earlier in about September 2003. As early as March 2004, there are records of concerns being raised as to the quality of the paintwork carried out by the second defendant. Despite that, on 1 April 2005, Gardiner & Theobald, who are surveyors and acted as the employer's agent under the contract between the first and second defendants, sent a letter to the second defendant stating that the works had reached practical completion as at 31 March 2005, although there were outstanding works to be completed and defects to be corrected.

4 On 22 April 2005, the claimant, the first defendant and the clubs entered into a joint venture agreement in respect of the management, funding and operation of the stadium.

5 Also on 22 April, the first defendant granted a lease of the stadium to the claimant for a term of 15 years. The lease contained a repairing covenant on the part of the claimant at clause 3.4.1, which provided that at all times during the term:

> "[the claimant] should put and keep in a state of good and substantial repair and renew as necessary the Property and, as and when the Landlord so requires, to replace and renew any fixtures or fittings beyond economic repair by suitable articles or equipment of similar and modern kind to the reasonable satisfaction of the Landlord."

However, it contained a proviso, namely that:

> "nothing contained in this Lease shall be construed as obliging the Tenant to carry out any repairs to the Property arising solely as a result of any latent defect".

6 "Latent Defect" as a term was defined at clause 1.1 of the lease as meaning:

> "a defect existing but not visible at the commencement of the term which is the result of defective design of the Property or defective workmanship or defective material used during its construction and latent defects shall have a corresponding meaning".

7 In April 2005, the claimant as beneficiary, the first defendant as employer and the second defendant as contactor entered into an undated collateral warranty, which was also executed as a deed.

8 On 10 July 2005, the stadium was officially opened.

9 On 21 July 2006, the claimant, the first defendant and the clubs entered into a further agreement, referred to in the pleadings as "the 2006 agreement", under which there was provision for an indemnity to be provided by the clubs to the claimant in various circumstances. At clause 7 of that agreement, there was the following provision:

> "7.1 For the avoidance of doubt, nothing in this Agreement shall affect the obligations on the part of [the claimant] under clause 3.4.1 of the Lease and in respect of any Latent Defect, which term is defined in the Lease. The [first defendant] shall take all reasonable steps at its own expense to enforce its rights arising out of any contract, warranty or service agreement entered into by it in connection with the design, construction, installation and fit-out of the Liberty Stadium [and] enter into such agreements for settlement or otherwise as it reasonably considers appropriate having regard to all the circumstances of the case."

10 At clause 7.2, it stated:

> "It is acknowledged by [the first defendant] that the indemnity in clause 4.1 shall not extend to Latent Defects, which remain the responsibility of [the first defendant] in accordance with the provisions of clause 7.1 above and nor shall it extend to any remedial work to be carried out by the Contractor in pursuance of any snagging list arising from the construction of the Liberty Stadium. [The first Defendant] shall consult with the clubs as to the content of the snagging list and shall take all reasonable steps to enforce its rights in respect thereof and to enter into such agreements for settlement or otherwise as it reasonably considers appropriate having regard to all the circumstances of the case."

11 On 4 April 2017, the claimant issued the claim form seeking damages currently in the sum of £1.1 million to £1.3 million against the first defendant and the second defendant in respect of alleged defects in the stadium, namely, firstly, paint delamination and associated corrosion to the exposed steel structural elements of the stadium and, secondly, inadequate resistance for foot traffic of the surface of the concourse and mezzanine floors, causing visitors to slip and fall. This application is concerned solely with the paint defects.

12 In respect of the paint defects, the pleaded case against the first defendant is that the defects were latent defects for the purpose of the lease and the 2006 agreement. It is said that the first defendant is in breach of an implicit or implied term of the lease in failing to remedy the latent defects, and the first defendant was in breach of clauses 7.1 and 7.2 of the 2006 agreement in failing to take all reasonable steps to enforce its rights as against the second defendant under the building contract.

13 In its defence, dated 13 November 2017, the first defendant pleads that there is no implicit or implied term in the lease obliging the first defendant to carry out the repair of latent defects. Clause 6.3 of the lease excludes any liability on the part of the first defendant for any loss or damage to the property or any consequential damage or economic loss resulting from any cause whatsoever. Then, pertinently, the first defendant asserts that the paint defects under the building contract are not latent defects for the purpose of the lease. Specifically at para.29 of the defence it is pleaded that:

> "It is denied that the matters alleged constitute a defect under the lease. Specifically, the paintwork was always to be renewed in the life of the lease and, further, it is

denied that any of the matters are latent defects. Neither item was [I think that must be invisible rather than] visible at the commencement of the lease."

In relation to that, it is further pleaded:

"There are no particulars from the claimant as to whether painting of the steelwork was defective at the date of commencement of the lease and, if it was so existing, that the same was not visible. The first defendant's personnel note of an inspection on 30 March 2005 makes clear that problems with the painted steelwork were evident."

14 In its reply, the claimant, in response to para.29 of the defence, pleads:

"It is admitted that some defects in the paintwork were visible on 30 March 2005, but the defects the subject of this litigation were not."

It also goes on to plead that:

"The first defendant has previously averred in correspondence that such defects were latent defects."

15 The application made by the first defendant seeks the following relief. First, that the claimant's case that the alleged paintwork defects constitute latent defects as defined in the lease be struck out under CPR3.4(2)(a) as disclosing "no reasonable grounds for bringing … the claim". Further, that the case be summarily dismissed under CPR24.2 as it has "no real prospect of succeeding" and "there is no other compelling reason why the case or issue should be disposed of at a trial". Secondly, in the alternative, the first defendant seeks an order under CPR18 that the claimant provide particulars and clarification with regards to para.29 of the claimant's reply, which I have just read out.

16 The applicable test is that, under CPR3.4(2):

"The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim …"

Further, CPR24.2 provides:

"The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) [the] claimant has no real prospect of succeeding on the claim or issue; or

(ii) …

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

17 In essence, the test in relation both to the strike out application and the summary judgment application is the same: the court has to consider whether the case that is pleaded has a realistic, as opposed to a fanciful, prospect of success. The court must not conduct a mini trial and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process. However, if there is a short pleading point or point of law that the court is satisfied it has all the evidence necessary for a proper determination of the question, and provided that the parties have had an adequate opportunity to address it in argument, the court should go on to determine such issue.

18 Mr Hussain, on behalf of the first defendant, submits that the admitted facts and documents make it clear that the claimant was aware of the paint delamination and rusting at the commencement of the term of the lease and that such defects were visible on a reasonable inspection. Reliance is placed on contemporaneous correspondence, the relevant extracts of which I have been taken to but which are also conveniently set out in the table in Mr Hussain's skeleton argument at para.34. What is clear from that correspondence is that, as early as 17 March 2004, defects were identified in the paintwork system. There was a reference to apparent thinness of the paint finish with slight signs of rust.

19 In September 2004, the claimant wrote to the first defendant referring to thinness of the painting to the exposed surfaces of the steelwork and expressing concern that the paintwork had not been carried out in accordance with the original specification. As at 24 November 2004, there is a Faber Maunsell fax to the claimant noting "discoloration, erection damage, unpainted contact surfaces" in relation to the steelwork members and, on 3 January 2005, Faber Maunsell wrote to Gardiner & Theobald highlighting that the readings that had been taken of the paintwork were above the specified 200 microns in thickness.

20 Further, in relation to the matters that might have been apparent and/or were in existence as at the date of commencement of the term of the lease, there is the Faber Maunsell site report, dated 30 March 2005, which refers to outstanding defects in relation to the paintwork and rust staining increasing. Those are relied upon by Mr Hussain as evidence that the defects now complained of were in fact in existence and visible as at 22 April 2005.

21 The first defendant referred to the fact that the claimant's case appears to be that it is the increased severity and extent of the corrosion and rusting that was not visible at the time. The first defendant's case is that, if the existence of rusting was visible, as admitted by the claimant, then it cannot constitute a latent defect under the lease, even if its incidence has subsequently increased. Alternatively, if the increased incidence of corrosion constitutes a separate defect from the previously visible defects, then it was by definition not existing at the commencement of the term of the lease and, therefore, cannot be a latent defect.

22 There is an alternative application by the first defendant in relation to the reply at para.34, where it is admitted that some defects in the paintwork were visible on 30 March 2005, but asserted that those defects are not the same as the defects the subject of these proceedings. The first defendant submits that it is entitled to proper particulars of the defects which the claimant admits were then visible. It should be noted that those applications are confined to the paint defects claim in relation to the allegations of breach of the implicit or implied terms under the lease. They do not extend to the flooring defects claim or in relation to the alternative basis of claim under the 2006 agreement.

23 Mr Mort QC, on behalf of the claimant, submits that the contemporaneous correspondence, including correspondence from Gardiner & Theobald at around 2008, indicates that defects in the paintwork were identified by all parties in 2008 as latent defects. Particular reference is made to a letter by Gardiner & Theobald, dated 10 November 2008, which refers to an

inspection in relation to defects that had been identified by Faber Maunsell in a report of October 2008 and that those defects were all accepted as being defects at the time. Those defects included, in relation to the structural steel frame, rust spots and areas of paint failure. It was stated by Gardiner & Theobald, with respect to the last three items, including painting to structural steelwork:

> "It was agreed on site that these items could be considered as latent defects. The approach for this is that these items have become apparent within the last year, which is well after the end of defects in March 2006."

There is then further correspondence through 2008 and 2009 to similar effect.

24 Mr Mort also relies on references in the witness statements of Mr Keepings and Mr Edmunds served by the second defendant, the contractor, to defects in the painting system that appeared in 2005 as being issues of minor defects such as chips and scratches on the steelwork that were repaired before the works were completed. Reliance is also placed on a final inspection of the steelwork prepared by Akzo Noble, dated 23 May 2006, in which the finished appearance of the steelwork was considered to be very good.

25 Both parties before me have relied upon the evidence of Mr Davies, who is the head of operations, facilities and development for the football club and director of the Swansea Stadium Management Co Ltd, i.e., the claimant. He was operations manager for the claimant from 1 August 2005 to 31 January 2006 and then general manager between 2006 and 31 March 2018. As is then apparent, he was not on site and involved in the project at the crucial date, that is, 22 April 2005, but clearly was involved significantly very shortly after that period. At para.56 of his statement, he provides as follows:

> "Looking back and having considered the documentation relating to the stadium construction in the spring and summer of 2005, it is clear to me that there were a number of issues which were of concern to the clubs."

He said that some of these were evident at the time, whilst others would only become apparent with the passage of time:

> "(a) the issue of the condition of the paintwork on the stadium structural steelwork was a serious concern which was common to all parties, including [the second defendant]. Whilst at that time the extent and severity of the problems which have persisted since were not evident, there was still sufficient visible evidence to suggest there was a patent defect as there was flaking paintwork, rust staining and discoloration evident."

At (c), he states:

> "There can be little doubt that there was a problem with the paintwork on the structural steelwork in the spring and summer of 2005. The nature and extent of the problems at that time, which it could be argued were largely cosmetic, should have led to consideration of the reasons why those issues existed. Such a review would surely have led to the conclusion that a patent defect existed."

Then, a few lines down, he states:

> "That said, the issues which should have been considered to be a patent defect in 2005 are different to those which later transpired to be a latent defect and were subsequently accepted by the second defendant as such."

He then refers to recent tests by the experts and says:

> "However, in the absence of that information and detail in 2005, there was no way in which the problems which have developed could have been foreseen even though the warning signs were present."

26 In relation to that evidence, Mr Mort's submission is that, firstly, Mr Davies was not involved as at the relevant time of 22 April 2005, but, in any event, he has produced a witness statement and will be available to give oral evidence at the trial. That is the appropriate forum in which to judge the implications of his evidence. The issue of whether the defects identified in 2008 were the same as the defects identified in 2005 is something that is not suitable for summary judgment. Further, it is submitted that the experts have not yet produced their reports, but the first defendant's expert has produced an earlier report in which reference was made to progressive delamination and rust in relation to the paintwork. There was no suggestion until the pleaded case by the first defendant that these were anything other than latent defects.

27 At trial, the court will have to determine, based on factual and expert evidence, whether the defects now relied upon were present and visible at the commencement of the term of the lease; whether the paint defects now relied upon were the same as the defects identified by Faber Maunsell and/or the second defendant and/or Gardiner & Theobald; or whether the severity and extent of the defects relied on constitute different defects and, if so, whether they existed as defects at the commencement of the term of the lease.

28 It is clear to me that those are matters that the court cannot sensibly determine without a full trial, at which the factual evidence and expert evidence can be properly challenged and subject to scrutiny alongside the relatively voluminous contemporaneous correspondence and reports.

29 The first defendant has identified a number of difficulties with the claimant's case, including what might appear to be inconsistencies between the contemporaneous documents, the witness evidence and the claimant's current case. No doubt those matters can be explored in cross-examination and submissions at the trial, but they are not matters that the court can sensibly determine on a summary judgment or strike out application. They are not so clear-cut that the Court should determine this without a full hearing.

30 For those reasons, I dismiss the first defendant's application for the paint claim to be struck out and/or for summary judgment in respect of that part of the claim.

31 However, turning to the request for further particulars, I accept that the first defendant is entitled to have further details of the claimant's case as to the defects that it claims were visible as at the commencement of the term of the lease. By reference to para.34 of the reply and the evidence that I have referred to of Mr Davies, it is clear that, first of all, there were paintwork defects that were identified prior to or at the commencement of the term of the lease in 2005. The claimant is not placing any reliance on those defects, for perhaps obvious reasons, in pursuing this part of the claim against the first defendant by way of latent defects. The first defendant is entitled to know, before his expert has to produce a report on this matter, the nature and extent of the claimant's case on this point. For that reason, I am minded to make an order that the claimant should provide clarification as to the

nature, location and extent of the defects in the paintwork that it accepts were visible as at 22 April 2005. The level of detail that will be required is the level of detail that the claimant will rely upon at trial. It is likely that the claimant will need some assistance from its expert. Although I note that Mr Mort has suggested that it is really a matter for the experts to get on with this part of their meetings and reports, in my view, the appropriate time for that to be clarified is prior to the experts reaching any agreement for use in the joint statement. It will provide an agenda for the experts to discuss and then in due course, if and in so far as they cannot reach agreement on it, it will provide the focus for the experts' reports.

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CERTIFICATE

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