

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE COMMERCIAL HUB

BETWEEN

RESISTANT BUILDING PRODUCTS LIMITED

PLAINTIFF

-and-

NATIONAL HOUSE BUILDERS COUNCIL

DEFENDANT

His Honour Judge McFarland
Recorder of Belfast
Sitting as a High Court Judge

18th March 2020

Background

1. The Plaintiff ("RBP") has issued a Writ of Summons against the National House Builders Council ("NHBC") claiming damages in and about an alleged malicious falsehood. It seeks, by this hearing, an interim injunction pending the trial of the action restraining NHBC from using, publishing, communicating or disclosing to any other person any information relating to RBP's magnesium oxide boards ("MgO boards") which suggests or tends to suggest that accreditation has been withdrawn, and any guidance relating to RBP's MgO boards which suggests to suggest that accreditation has been withdrawn.
2. MgO boards are a building material and are used for a covering or sheathing purpose for walls and ceilings. Internally it could perform a role similar to gypsum based 'plasterboard', but in addition to this internal use it can be used inside cavity walls and externally with a final coat of render.
3. RBP is a manufacturer of MgO boards. NHBC is a Council which operates as a non-profit making company limited by guarantee. Its major interface with the public involves the issuing of 10 year warranties and guarantees ("NHBC Warranties") covering newly constructed dwellings in the United Kingdom.

NHBC warranties are widely accepted within the industry, by estate agents, solicitors and mortgage providers. NHBC also carries out other functions and acknowledges that it undertakes the role of a standard setter when it comes to building practice.

4. NHBC Warranties are provided in a very high percentage of newly constructed dwellings. They provide a degree of security in that the NHBC will guarantee the building work for a period of ten years so that any defect manifesting itself during that period will be repaired. It does not hold a monopoly as such. In the absence of a NHBC Warranty purchasers and their lenders may resort to a similar warranty issued by another institution or an architect's guarantee, however, given the standing of the NHBC and the widespread acceptance of the NHBC Warranty, the absence of a NHBC Warranty could be a major impediment to the marketability and ownership of a newly constructed dwelling, and its potential re-sale during the initial 10 year period.
5. The British Board of Agrement ("BBA") is a building product certification authority. On the 21st October 2015 it issued a 12 page certificate - 15/5255 which certified certain MgO boards manufactured by RBP, namely Multi-Pro and Multi-Pro XS (for use as internal and external wall sheathing) and Multi-Rend (for use as a render carrier board in timber framed buildings). The certificate contained a statement that the products were fit for purpose for their intended use provided they are installed used and maintained as set out in the body of the certificate. At the time NHBC were prepared to accept this certificate and this is confirmed by an endorsement within the certificate in the following terms - "NHBC Standards 2014 NHBC accepts the use of Multi-Pro, Multi-Pro XS and Multi-Rend, provided they are installed, used and maintained in accordance with this Certificate....".
6. Due to certain apparent building failures in Denmark relating to the use of MgO boards externally, major concerns began to develop within the industry. It is not necessary to detail the concerns in this judgment, but the analysis provided by an academic suggested that MgO boards were not suitable for external use in the Danish climate. The boards were found to commence a "crying" process at levels of humidity lower than the typical Danish winter. "Crying" is a term to describe the leeching of magnesium oxide and water. As a consequence salt from the boards infected wood and corroded metal in contact with them, with the potential for mould and long term decomposition. It should be noted that no RPB products had been used in Denmark, although the fact that there was something rotten in the State of Denmark, did not go unnoticed in the United Kingdom.
7. A technical study by Adrastea Limited in April 2018 indicated that there was a "*considerable* difference between the observed performance of the Resistant samples (under controlled, accredited laboratory conditions) compared with the Danish control standards" (The emphasis is the report's emphasis.) The study concluded that the RBP samples vastly exceed the performance of the Danish control samples in all key areas, and in overall terms they comfortably outperformed the other samples submitted for test and significantly exceeded

the requirements of British and European Standard BS EN 1995 – 1 – 1.
(Again the adjectives are the report's adjectives.)

8. The NHBC issued a press release on the 6th December 2018. This release recognised that there were variances in the types, quality and manufacturing process of MgO boards which will effect their performance. It further recognised that there is no British Standard for MgO boards. (British Standards are standards issued by the BSI Group, a company incorporated by Royal Charter which certifies products and services with its well know 'Kitemark' and bearing the prefix 'BS'). It then stated that as of 1st January 2019 MgO boards must hold independent third party certification, which includes specific reference to compliance with NHBC Standards; boards are fixed with stainless steel fixings; the boards were not to be used below damp proof course level; and where used as sheathing, the boards had to be protected from precipitation by the use of a breathable membrane.
9. It then stated that only two boards were currently accepted by the NHBC, those covered by the issue of BBA certificates 15/5255 (referred to above) and 17/5428. The latter certificate related to a board supplied by a company Buildings Adhesives, but it was manufactured by RBP.
10. Given the status of the NHBC and the wide-spread use of the NHBC Warranty, the impact of this Press Release gave RBP a dominant position within the MgO board market in the United Kingdom.
11. The Press Release also made reference to ongoing issues – “We are working with a number of stakeholders to understand the exact cause of the [Danish] failures” and “We have been in discussion with the certification bodies and a number of MgO board manufacturers who are working to provide us with assurances that the boards available in the UK will not give rise to the same problems as those seen in Denmark”.
12. Research was undertaken on behalf of RBP by scientists at the Queen's University Belfast (“QUB”). This research was conducted to examine the performance of MgO boards and in particular to determine the service life of the boards. At this stage the research is still ongoing. Reports have been submitted dated 15th April 2019 and 19th December 2019. There is a further short update dated 9th March 2020. These documents contain substantial details and it is not necessary at this stage to set out a detailed analysis. In brief, research has been carried out on six sample boards, A – the RBP board, B a Chinese board similar to those used in Denmark, and C to F – other MgO boards available in the United Kingdom. The research identified that whilst each board contained a mixture of five main constituent minerals, the level of minerals in each board was different. An impermeability test indicated that board B was more porous and consequently more susceptible to the ingress of moisture. This result resulted in the QUB academics observing “The problems observed in Denmark are not surprising if a board this susceptible to the transport of moisture was used”. A “Crying” test subjecting the boards to a temperature of 30 degrees and 90% relative humidity was carried out. The test over 147 days (as reported in the first report) indicated that the RBP board and another board (D) had no “crying”, and the other boards

- displayed “crying” after a number of days – board B and board C after 11 days, board F after 28 days and board E after 57 days.
13. The April 2019 report concluded that the results to date indicated a superior performance from the RPB board, with a possible explanation being the addition of phosphoric acid.
 14. The 19th December 2019 report referred to a development of the testing in relation to “crying” with three main tests undertaken. These involved exposing the boards to 90% humidity, 80% humidity and an intermittent exposure to 90% humidity and drying out. This was a long term project with a research period of 2 years.
 15. The March 2020 report from QUB indicates that after 175 consecutive days of 90% humidity no changes had been observed. Co-relating this to United Kingdom weather data, the opinion expressed was that the research to date indicates that the RBP board would have a more than satisfactory service life.
 16. During this period of research two United Kingdom related problems came to the attention of NHBC. Reports were emerging of potential failed rendering to external walls at two development sites in Scotland. There is at this stage unresolved issues concerning the manufacturer of the MgO boards in use at these sites and the correctness of their fixing, the use of fillers and the use of unsuitable render. A site visit took place on the 7th October 2019. It is reported that the 95 low rise dwellings on two sites were constructed in or about 2010 – 2012 using different thin coat render systems on MgO boards, attached to soft wood battens. All the dwellings are reported to be displaying staining patterns. Specific issues included a large section of a MgO board coming away from the building, render detaching in localised areas, loose boards, and the presence of dampness to the boards. The conclusion from the site visit by Paul Gribbens, a Standards and Technical manager with NHBC, was that the observed damage co-related to that seen in Denmark.
 17. Paul Gribbens also visited two adjacent newly constructed dwellings in Dorset on the 20th November 2019. RBP MgO boards had not been used in this construction. Paul Gribbens observed evidence of moisture staining particularly in the roof void and the ceilings below. Paul Gribbens was of the view that his observations bore a remarkable similarity to what he described as “those reported from cases overseas”, (a presumed reference to Denmark).
 18. During this period communications were passing between NHBC and RBP and other parties and meetings were convened between various interested parties in an attempt to deal with this problem.

Alleged malicious falsehood

19. There then followed two communications, and one draft communication, which are the subject of the alleged malicious falsehood.
20. On 25th October 2019, Paul Gribbens wrote an email to Paul Valentine of the BBA. In that email Paul Gribbens set out the background and history and then stated – “The decision to remove our acceptance of RBP MgO board is

taken as a matter of caution based on a lack of authoritative industry guidance, failures seen overseas and currently unexplained failures in the UK, For the avoidance of doubt, this applies to all uses of the board and where the board has been used in building systems. I will contact the MOBBTA once we have update our website. The offer of accepting boards assessed under a PAS standard still stands, providing the drafting of the PAS has input from independent experts and it addresses concerns with durability and other relevant critical functions.” (MOBBTA is the magnesium oxide building board trade association. PAS stands for publically available specification and is part of the British Standards process referred to above.)

21. A letter from the NHBC Legal Department of 5th November 2019 to RBP’s solicitors attached a proposed guidance which the NHBC intended to publish on its website. That guidance is currently held in abeyance pending the outcome of these proceedings and has not been published. The letter also indicated that the NHBC intended to write to 30 “top” builders to inform them of the guidance.
22. The Guidance is an A4 document. It sets out the background, and states – “In our last update, December 2018, we indicated that we were working with a number of stakeholders to understand the exact cause of the overseas failures and that NHBC’s position on MgO boards was subject to change. Since that update, it has not been possible to agree a method that will adequately verify the performance of MgO boards and therefore we will no longer accept them for use in the construction of homes where we are providing NHBC Buildmark warranty. Next steps – with immediate effect, where be become aware of MgO boards being proposed we will advise the builder that these boards are not acceptable to NHBC.”
23. An email was sent on 13th December 2019 from Richard Smith, Head of Standards, Innovation and Research at NHBC to Dave Longwell of Building Adhesives. Building Adhesives is the company holding the second BBA certificate referred to above. It is accepted that this email was sent in error and have been withdrawn. The court has been advised that four other identical emails were sent to other parties in the building trade holding other different BBA certificates. Each of these emails states that NHBC will be advising staff and customers that MgO boards are no longer acceptable to NHBC from 24th January 2020.
24. The case presented by RBP is that the only inference or innuendo that can reasonably be drawn from the correspondence and proposed statement is that RBP’s boards are unfit for purpose in the building trade. A statement that the boards are unfit for purpose is false. The NHBC’s decision making process is flawed and reckless based on a wilful ignoring of the available evidence, including technical and research evidence. As such NHBC is displaying malice.
25. RBP are seeking interim relief to “hold the ring” until the case can come on for full trial.
26. The Commercial Hub is in a position to fast track the listing of this case, and a provisional listing during the week commencing 27th April 2020 is available.

The parties are confident that the pleadings and discovery process can be completed by that time.

The law

27. The law in relation to malicious falsehood and the granting of interim relief by way of injunction is well established. It has been clearly articulated by Whittle J in the recent case of **Al-Ko Kober Limited -v- Sambhi [2017] EWHC 2474 (QB)**.
28. In order to make out a case of malicious falsehood RBP must show that NHBC has published words that are false; that those words refer to RBP or its property or business; that those words are published maliciously; and that special damage has followed as a direct and natural result of their publication. (Paragraph [10] of **Al-Ko Kober**)
29. Malice can be proved if NHBC knew that the relevant statements were false, that it was reckless and published the statements not caring whether they were true or false, or that holding an incorrect belief that they were true, NHBC published them to injure RBP (see Duncan & Neill on Defamation (4th edition) at 19.14).
30. As for the granting of an injunction, Whittle J at [7] stated.

"... I could only grant the injunction sought in relation to malicious falsehood if I was satisfied that no judge or jury could reasonably conclude that the statements made by the Defendant were true However, in assessing whether the statements might be true, I am not bound simply to accept the Defendant's assertion that they are true and leave the matter to trial. ... the Defendant has at least to explain the basis for his assertion that the statements are true, so that the Court is in a position to assess whether the Claimant's case on falsity might be controverted at trial."
31. The single purpose rule in defamation does not apply in malicious falsehood (see **Ajinomoto Sweeteners SAS -v- Asda Stores Limited [2010] EWCA Civ 609**). As a consequence a judge at trial has to indicate the reasonably available meanings and decide if a substantial number of persons would reasonably have understood the words to have such a meaning and then decide, in respect of that meaning which is in fact false, whether the author was actuated by malice (as per Longmore LJ in **Cruddas -v- Calvert [2013] EWCA Civ 748**)

Discussion

32. NHBC attack the breadth of the injunction sought, and with some force. Counsel for RBP largely conceded this in oral argument, but insisted that the Court could grant sufficient interim relief to protect RBP's interests pending trial. That could be done by the Court indicating the broad terms of such relief, and the parties agreeing the terms. I am happy to proceed on this basis, although care should be taken, particularly in applications for interim relief, that the proceedings and draft order, should be presented to the Court with realistic terms.

33. RBP relies on innuendo from the statements, and intended statements. There is nothing factually incorrect in anything NHBC has said or intends to say. It has made a decision to no longer provide its 10 year warranty to houses in which MgO boards have been used. It has, and intends to promulgate that decision. The suggested innuendo is that the MgO board manufactured by RBP is not fit for purpose.
34. There are a number of reasonably available meanings. The first is that it is a factual statement with no innuendo. If innuendos can be drawn, there are a number of reasonable meanings - RBP boards are not fit for purpose generally; or NHBC does not consider them fit for purpose; or that NHBC makes no decision on the issue of fitness but is not sufficiently confident in their performance to stand over them and to provide a 10 year warranty .
35. The standing and role of NHBC is relevant. It is a warranty provider and it is a standards setter. The setting of standards is not carried out in the same way as, for example the BSI or BBA. It does not certify certain products or building methods as fit for purpose. Specifically in relation to BBA certificate 15/5255 it was the BBA that certified the fitness for purpose of the RBP MgO board, and the NHBC indicated acceptance of the use of the boards in relation to its Standards. This is a specific set of standards (as opposed to a generic term), the Standards being the technical requirements, performance standards and guidance for design and construction of houses applicable to every property to be covered by the NHBC warranty. These standards will develop from time to time and are updated and re-published on a regular basis. By setting these standards it drives up the standards of building products and techniques.
36. To summarise the current position, the BBA have a certificate 15/5255 stating that the RPB products Multi-Pro, Multi-Pro XS and Multi-Rend MgO boards are fit for purpose, but the NHBC have now indicated that it will no longer accept the certificate or the use of such boards in dwellings intended to be covered by the NHBC Warranty.
37. The Court must exercise caution so that it does not expand its jurisdiction. It is not making a decision on the correctness of the decision made by NHBC to withdraw its acceptance of the RBP boards. It is not its function to do so, and it lacks the expertise. It is not considering the reasonableness, or otherwise, of the decision and the decision making process, as it could do if the decision was being judicially reviewed. Decisions of the NHBC are not susceptible to such scrutiny.
38. Further caution must be exercised, as part of the impetus for the decision to withdraw acceptance, was a commercial one, based on an assessment of risk. The NHBC is taking a financial risk in providing its warranty. It must have the freedom to make such decisions. These are commercial decisions weighing up the risk when set against the premium to be paid (the registration of the property by the house builder). As a standard setter it bears some wider obligations in that regard, unlike another insurance provider which could just withdraw insurance cover for any particular product or insured party, without indicating any reason or justification.

39. The test is that I have to be satisfied (on the balance of probabilities) that no tribunal of fact (be it judge or jury) could reasonably conclude that the statements, or any of the innuendos reasonably drawn from the statements, were and are true.
40. I am not of such a view. It could be open to a tribunal of fact to find truthfulness or correctness in the statements, and some of the innuendos reasonably drawn from them. There is clearly a problem with use of MgO boards in the construction of buildings when it is performing a barrier external role. Much will depend on the quality of the product. There is no approved standard for such quality. There is significant evidence from Denmark, and now limited evidence in the United Kingdom of potential problems with some MgO boards. How the NHBC dealt with its decision making goes more to the issue of recklessness attaching to the issuing of any statement, but a brief analysis indicates an engagement with, and a consideration of the ongoing research emerging from QUB. To date, preliminary findings would appear to indicate no problems with the RBP boards, but the research has not finished. Decisions about whether to provide a warranty for a building using a particular product are commercial decisions, weighing up all the evidence. That evidence includes the research and the science behind it, but it also includes the actual performance of the building and product in the environment as well as an assessment of the cost of any remedial work, taking into account the amount of the premium collected for the dwelling.

Decision

41. I therefore dismiss the application for interim relief. I will reserve the issue of costs to the final hearing.
42. This decision only relates to the application of the test for the granting of interim relief. It is not a decision relating to the substantive action which will be determined in April.

Postscript

43. All the research and comment to date has focussed on MgO boards that are used externally. No evidence has been placed before the court suggesting that there is any issue relating to the use of MgO boards internally, that is for use for the sheathing of internal walls and ceilings and in cavity walls. Assuming the integrity of the external façade and the use of the boards above any damp proof course, such use would not involve contact (save in an emergency) with moisture. The MgO board is not in a barrier use as in the case of external wall, and the ingress of, and exposure to, moisture and “crying” is not likely to be a concern. There is no reference to any internal, or cavity wall, problem in Denmark, or elsewhere.
44. I consider that although the parties will now be focussed on preparing the case for final hearing by the end of April 2020, serious consideration should

be given to attempting to resolve this issue through mediation, or other similar process. Malicious falsehood is a fairly blunt instrument when applied through the court process, and has the potential of not providing a successful outcome for either party. From the consideration of the arguments presented in the case, I believe that a mediated solution could still be available which may be beneficial to both parties.

45. I would like to place on record my thanks to counsel, Mr Stephen Shaw QC and Mr Keith Gibson, for RBP, and Mr Samuel Townend for NHBC for their written and oral submissions. They all provided clarity to what is a complex matter.