IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT

Claim No. A50MA088

1 Bridge Street West
Manchester

Wednesday, 22nd April 2015

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

WILLIAM CLARK PARTNERSHIP LIMITED

Claimant

-v-

DOCK ST PCT LIMITED

Defendant

Counsel for the Claimant: MR. JUSTIN MORT, QC

Counsel for the Defendant: MS. LUCY COULTER

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE JUDGE: This is an application made by the claimant for specific disclosure and permission to rely upon the expert evidence of a forensic accountant. The application is one which was made relatively recently, on 17th April, and was listed to be heard today at the pre-trial review for the trial, which is due to begin on 8th June. It is supported by a witness statement from the claimant solicitor, Mr Riley. The defendant has not had the opportunity fully to consider the application or to respond to it with evidence but, at my invitation, the defendant has addressed the application today on the basis, as I made clear at the outset, that if I considered that it was necessary fairly to deal with the application to give it the opportunity to put in evidence, then it could do so by adjournment. In the circumstances that have arisen, that has not been necessary.

2. This is an action where the claimant, which is a firm offering quantity surveying and project management services, seeks payment for outstanding invoices in relation to professional services provided to the defendant in relation to a project to develop a property in Fleetwood, Lancashire for use as a doctors' surgery.

3. The defence and counterclaim raises allegations of professional negligence and, in particular, allegations that there was a significant cost overrun as a result, it is said, of the claimant's breach of duty. It is said that, as a consequence of the claimant's alleged failure to provide valuations, the contractor on the project commenced adjudication proceedings against the defendant as the employer which it was, in effect, forced to compromise, as a result of what it says were the claimant's breaches. I should observe that is not pleaded in the defence and counterclaim that in consequence of the claimant's breaches it was not financially able to defend these claims, rather it is said that it was not in a position effectively to defend itself because of the claimant's breaches.

4. The claimant's response in the reply in defence to counterclaim raises a wide number of matters, and liability is vigorously denied, as is causation. In paragraph 6(c), in the summary of the claimant's position, there is a positive allegation that the defendant's losses have been caused by its own actions or those of its principal director and sole shareholder, a Mr Abbot. The defendant is put to strict proof in respect of the uses of the project monies and/or funding, and it is said that Mr Abbot reduced the contract sum to an artificially low level. One of the key issues in this case arises from the fact that the project was financed by monies advanced by a commercial funder, Aviva. It is said by the claimant that, at the defendant's insistence, the project cost was reduced to an artificially low level to enable to the defendant to use part of the Aviva funding to discharge a charge held by a previous funder.

5. It is also said by the claimant that the defendant misapplied the funds provided by Aviva, and used some of those funds for other purposes. That is made crystal clear in the witness statement of Mr Crewdson of the claimant, in particular in paragraphs 86 to 88 entitled, "Misuse of Aviva funds," where Mr Crewdson refers to evidence that funds were misused and says in terms in paragraph 88 that, in his view, if these monies had been paid as required under the loan agreement, all parties would have been paid, including the contractor Parkinson, and the adjudication would have been avoided. Therefore, it is clearly going to be the defendant's case at trial that it was this misuse of funds which led to a position where the defendant could not afford to make payments to the contractor and others.

6. There was a request for further information of the defence and counterclaim, and at a hearing before HH Judge Raynor QC in August 2014 a request was made that certain further requests should be properly answered. Judge Raynor directed that particulars should be provided in response to the following request:

> "Please provide particulars (preferably in the form of an outline balance sheet of incoming funds from Aviva and any other lending/funding sources, and outgoing projects expenditure, and any other expenditure) of: (a) the total amount of funding the defendant received in respect of the project …and (b) the use to which the total amount was put."

7. The answer provided in September 2014 said that "a copy of the defendant's account for the period 1st January 2011 to 1st April 2013, setting out *inter alia* the use to which the loan was put is attached hereto". Unfortunately, it is not entirely clear what, if anything, was actually attached as the account referred to. I have been told that there is some correspondence reflecting the fact that the document, whatever it was, was too bulky to be emailed, and that it was going to be provided by other electronic means or in hard copy. However unfortunately, because this point has only recently been discovered, neither of the solicitors are able to say definitively what, if anything, was provided. What is clear is that, at the time, the claimant's solicitors were not claiming that what had been said was being attached had not been sent or received, and no further steps were taken in that regard at that time. In parenthesis, I should note that it is common ground between the parties, rightly so, that if on further investigation it transpires that nothing was sent then of course, it should now be sent, and there can be no argument about that.

8. However what subsequently happened was that after a review of the disclosure exercise, in late October 2014, the claimant's solicitors asked for disclosure of bank statements and balance sheets on the basis that they were relevant to the counterclaim. Initially it was said that they would be provided and subsequently it was said that although they were not relevant nonetheless they were provided in order, it was said, to put the claimant's mind at rest, so that bank statements and balance sheets were provided in mid-November 2014. They are attached to Mr Riley's witness statement in support of the application.

9. Nothing more was heard of the matter until 15th January 2015, when the claimant's solicitors, Kennedys, wrote to say that, having reviewed the bank statements, they remained of the view that the Aviva funds were being used for "your client's personal use" and that this misappropriation "caused your client's inability to pay the final account monies." They also said:

> "We consider this point requires further investigation. We are taking steps to instruct a forensic accountant to review the information and produce a report. We intend to apply for permission to do so, but we invite your consent."

There was no substantive response to that letter and, on 3rd March 2015 Kennedys wrote again to say that they now have the draft report, which they said had identified a significant shortfall between the expenditure received and expenditure incurred. In order for a full analysis of your client's accounts to be carried out they asked for the following additional information: firstly details of the cheques issued on that account over the

relevant period, from January 2011 to September 2014, showing the payee; secondly, details of any expenditure incurred by the defendant before that account was opened; thirdly and fourthly, a detailed analysis of the director's loan account and the loan balance owed to his associated company. This was because it was said to be clear that monies had been transmitted from that bank account to Mr Abbot personally and his associated company. Finally, copies of banks statements for certain specified bank accounts to which payments had been made from the bank account were requested.

10. It is clear that all of these requests came from the draft report from the expert accountant instructed by the claimant, which was subsequently disclosed on a voluntary basis later in March 2015, and which I have seen. The instructions to the accountant were to consider various documents and to comment on the allocation of the Aviva drawdowns, and specifically to comment on whether the Aviva funds had been misused beyond the uses outlined in the Aviva loan agreement. It was the preliminary view of the expert that this was indeed the case, but it was the further documents which he said he needed to complete the picture which were requested.

11. After some further exchanges the defendant solicitors wrote on 14th April 2014, providing certain information about costs incurred, but refusing to provide all of the further information required and refusing to agree to the claimant having permission to rely upon accountancy evidence.

12. The claimant through counsel submits that the question of the defendant's financial position, and in particular its appreciation of its financial position as at the time the reduction in the contract cost was discussed and agreed and also as at the time the settlement with the contractor was entered into is relevant, particularly to the issue of causation but also to the issue of breach. It is said that these are matters which Judge Raynor effectively directed should be dealt with properly in August 2014 and that this application is really no more than completing the process. It is said that what is required is relatively limited further information to enable the accountant to complete the exercise of showing the financial position and what happened to the Aviva funds. It is accepted that it would not be a relevant question for trial to investigate whether or not the defendant did breach its obligations to Aviva, and there is no suggestion that this is said to be relevant to an attack on credibility. It is said, in terms, that it is a sensible and proportionate step to take in relation to the investigation of causation and, to a limited extent, breach of duty. It is also said that the costs are relatively limited; Mr Riley, in his witness statement, suggests that they are a few thousand pounds.

13. The defendant resists the applications, firstly on the grounds of irrelevance and secondly on the grounds of delay and cost. In short, it is said that in so far as this question is relevant at all it is really only of tangential relevance. That is particularly so in circumstances where, in his witness statement for trial, Mr Abbott has accepted in terms that it is the case that monies provided by Aviva were not used solely for the purposes of this project and that the account was treated as a general business account. However he says that there was nothing wrong with this, and that this was not the cause of the defendant's difficulties. It is also said that this is an application which goes far and beyond the scope of what was originally ordered by the court in August 2014, when what was envisaged should be provided was outline information only, and that this application has taken on a life of its own. It is said that it is a thinly disguised attempt to attack Mr Abbot's credibility and it is made at a very late stage.

14. In my view, the claimant must properly justify an application made at a late stage for specific disclosure and for permission to rely upon expert evidence, when no such permission was sought or granted at the case management conference. In my judgment the claimant has failed to do so. I am satisfied that although in general terms there is an issue which arises on the statements of case as to the defendant's financial position, and in particular what it intended to do so far as the Aviva funds were concerned and what its financial position was at the time the settlement with the contractor was entered into, that is not, in my view, a key issue in the context of this case, nor is it so significant as would justify what I am satisfied is, in reality, an intensive further proposed investigation. It seems to me that this case is not going to turn on, nor does it require, an extensive blow-by-blow analysis of the defendant's financial position, in particular whether or not it would have been different or better if, at various stages, certain monies had not been used for purposes not connected with the development. Insofar, for example, as it is said by the claimant that the defendant could have settled with Parkinson on a perfectly acceptable basis but for the fact that it did not have the money to do so, that would be demonstrated by the bank statements already disclosed in any event.

15. It does not seem to me that it requires the sort of detailed analysis which is being anticipated by the expert and which is the subject of this application. Although Miss Coulter has submitted that it is a relatively limited inquiry, and although there is no positive evidence from the defendant to the effect that it would be very time consuming or costly to provide, it seems to me that it is obvious that asking for what is in effect full details of all payments made out of a working account for a three-year period cannot be said to be a limited exercise, nor can the request to provide full details of all movements in relation to director's loan accounts and other accounts, as well as information relating to at least three other accounts.

16. It is also a late application. I do not mean necessarily to criticise the claimant or its solicitors for making it late, but simply to reflect the fact that this case is now in the stage of the run-up to trial, where there is still a lot of work to do. The pre-trial process has already been much extended and delayed and this exercise, it seems to me, would amount to an intrusive distraction from what really needs to be done between now and trial. Although it may well be the case that the costs of completing the report, so far as the claimant's forensic accountant itself is concerned, is limited, that does not take into account the time and cost involved on the defendant's side in obtaining this information, nor of the potential need for the defendant to obtain its own expert evidence and oral expert evidence, if necessary, having to be heard at trial. I am also conscious of the fact that the trial timetable is tight anyway, and to overload this trial with potentially contentious forensic accounting exercise, in the context of the type of blow-by-blow financial analysis that Miss Coulter has intimated, runs the risk of potentially derailing that trial timetable.

17. For all of those reasons, therefore, I dismiss the application for specific disclosure and do not grant permission to rely upon forensic accountancy evidence.

(Discussions as to costs follow)

18. I will order (1) that the application is dismissed; (2) that the claimant shall pay the defendant's costs of the application, in any event, to be the subject of detailed

assessment, if not agreed, but not to take place until the conclusion of the trial or further order, because it would be pointless to have a separate detailed assessment at this stage; (3) the claimant make an interim payment on account of costs in the sum of £2,500.

(End of judgment)

(Discussions as to further directions follow)

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