Case No: HT-09-155

Neutral Citation Number: [2009] EWHC 3839 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 4 June 2009

BEFORE:

MR JUSTICE RAMSEY

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BETWEEN:

Claimant

BRACEFORCE WAREHOUSING LIMITED

- and –

MEDITERRANEAN SHIPPING COMPANY (UK) LIMITED **Defendant**

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MR JAMES WATTHEY (Instructed by Lawrence Stephens) appeared on behalf of the CLAIMANT

MR CALUM LAMONT (Instructed by Hammonds LLP) appeared on behalf of the DEFENDANT

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JUDGMENT

MR JUSTICE RAMSEY:

Introduction

1. In this claim under CPR Part 8 the claimant seeks declarations concerning both an expert determination and also parallel Part 7 proceedings commenced by the defendant in this court. In summary, the claimant contends that the expert has no jurisdiction or alternatively that the expert determination should be stayed and the dispute resolved by court proceedings. The defendant in response contends that the expert has jurisdiction and that the court proceedings should be stayed.

Background

2. By an agreement for lease dated 6 December 2001 (which I will refer to as "the Agreement") the claimant agreed to build and thereafter to grant a lease to the defendant of warehouse premises situated at Unit 2, Orion Business Park. The defendant alleges that the works undertaken by the claimant were defective, including defects in the external slab, associated drainage and roof and internal floorings. By clause 24 of the agreement it was provided:

> "*Save where otherwise provided if any dispute shall arise between the parties hereto with respect to the rights duties or liabilities of either party under or by virtue of or arising out of or in consequence of this Agreement (other than the construction or interpretation of this Agreement on points of law) the matter or difference shall be determined by an expert to be agreed between the parties, or failing agreement to be appointed on the written application of either party by the President for the time being of the Royal Institution of Chartered Surveyors whose decision shall be final and binding on the parties and whose costs shall be borne by the parties as directed by the expert or in default of such direction equally between the parties.*"

3. By a letter dated 14 November 2007, as the end of the six-year period under the Limitation Act 1980 approached from the date of the Agreement, the defendant's solicitors, Hammonds, wrote to the claimant to set out the terms of an agreement concerning limitation. They referred to the dispute and said in their letter:

> "*In default of the parties reaching an agreement in respect of the dispute, the dispute will have to be referred to expert determination under the terms of the Agreement for Lease.*
> *It is possible under the relevant provisions governing limitation of liability for actions under English law that the limitation period in respect of the dispute might expire on 5 December 2007. Without prejudice to MSC's contention that limitation*

might expire on 5 December 2007 and reserving the rights on behalf of MSC to contend that the limitation period might expire on a date other than 5 December 2007, the parties have mutually agreed to extend the limitation period. This extension has been agreed upon the terms below in order that the parties may seek to resolve the dispute without the need to refer the dispute to expert determination.

The parties agree so as to bind them and any successors or assignees as follows:
(1) that the limitation period in respect of all causes of action arising out of the dispute including but not limited to any contractual breach of covenant claim is hereby extended by one year to 6 December 2008.
(2) that in the event that any proceedings are issued from the date of this letter up until 6 December 2008 that Braceforce will not raise any limitation defence in answer to the claim."

That letter was signed by the claimant on 16 November 2007, confirming agreement to the matters set out in it.

4. On 24 November 2008, over a year later, after some further discussion between the parties in relation to the dispute, the defendant wrote to the claimant setting out the background to the dispute, the allegations of breach of contract, the defects, remedial work and quantum. In relation to what it referred to as ancillary matters, it referred to clause 24 of the contract and said this:

> "*…the parties are in the first instance to attempt to agree on the appointment of an expert to hear the dispute. In this regard MSC would propose engaging Mr Barry Milton to hear the dispute, a copy of Mr Milton's curriculum vitae is attached by way of information ... Please provide your comments on Mr Milton's appointment and confirmation as to whether Mr Milton's appointment is agreed by close of business on 5 December 2008. In circumstances where no response is received by this date and/or agreement on the identity of an expert is unlikely to be reached between the parties, MSC will proceed to make the appropriate application to the RICS in accordance with clause 24 of the agreement.*"

5. They also said in relation to the limitation agreement:

> "*In light of the current circumstances MSC requests that Braceforce enter into a further Standstill Agreement in the same form and content save for an extension of one year. Braceforce*

is required to confirm whether it is agreeable to entering into a further standstill agreement by close of business on 26 November 2008. In the event that confirmation is not received from Braceforce by this date, MSC will have no option but to issue protective legal proceedings in the Courts."

6. No response was received from the claimant. On 28 November 2008 the defendant issued a claim form in this court (which I will refer to as "the Part 7 Claim"). In that claim form the brief details of the claim were as follows:

> "*The Claimant claims against the Defendant for breach of the Agreement for Lease made on 6 December 2001 between (1) the Defendant and (2) the Claimant, as more fully set out in the claimant's letter to the defendant of 19 November 2008, with damages to be assessed.*"

It appears the reference should probably have been to the letter of 24 November 2008.

7. Those proceedings were subsequently served on the claimant, by way of a letter from the defendant's solicitors, on 24 March 2009. In addition, on 8 December 2008 the defendant applied for the appointment of an expert by the President of the RICS. On 28 January 2009 the President appointed Mr C A Little as the expert. The expert wrote to the parties on 4 February 2009 enclosing terms and conditions and proposing a procedure. On 11 March 2009 RJWA Consulting, acting on behalf of the claimant, responded and indicated that they might require more time for a response. Later, on 30 March 2009, RJWA Consulting wrote to the expert to say this:

> "*Our Client's legal advisers have referred us to a letter that was written by Messrs Hammonds to our clients of 14 November 2007, a copy of which is enclosed. As you will observe, the letter refers to the matter of statutory limitation, a matter which may not fall within the provisions of Clause 24 of the Agreement for Lease.*
> *It has been suggested that as there may be a question arising on jurisdiction and that before taking part in the process that the matter of jurisdiction should be resolved as a preliminary matter prior to my client's consideration of any substantive response.*"

8. The expert wrote for clarification on 31 March 2009 and on 1 April 2009 RJWA Consulting responded, questioning the expert's jurisdiction. After further correspondence between the expert, RJWA Consulting and Hammonds, the expert wrote on 23 April 2009 to give

directions as follows:

> "*(1) Any application or claim by the Respondent to the court concerning my jurisdiction shall be brought not later than 27 April 2009.*
> *(2) The Respondent shall either provide a copy of any application made to the applicant and to me immediately upon it being lodged with the Court and confirm not later than 1 May 2009 that its challenges to my jurisdiction are withdrawn.*
> *(3) If no such application or claim is brought the Respondent shall provide its substantive response not later than 5 June 2009.*"

9. On 27 April 2009 the claimant commenced these part 8 proceedings and directions were given on 28 April 2009 which have led to the hearing of the Part 8 claim.

The Issues

10. Mr Watthey, who appears for the claimant, submits:
(1) that by the letter dated 14 November 2007 the parties extended the limitation period to 6 December 2008 and that the right to refer the dispute for expert determination under clause 24 of the agreement expired on 6 December 2008;
(2) that there is no right to extend time for commencement of expert determination and the expert determination was commenced out of time because it was not commenced by the letter of 24 November 2008 but by the application to the RICS of 8 December 2008;
(3) that, in any event, the parties have agreed to litigate the dispute by service of the Part 7 Claim form, by the claimant acknowledging service and by requesting and being granted an extension of time for the Defence, alternatively, that this amounts to an election by the defendant for the matter to be litigated;
(4) that litigation has been commenced and there is a substantial dispute valued at £3.7 million which, in any event, is more appropriately dealt with in the court and that the court should stay the expert determination while the court determines the dispute.

11. Mr Lamont, who appears for the defendant, submits:
(1) that the expert has been properly appointed and has jurisdiction because the letter of 14 November 2007 did not impose any limitation by way of time bar where one was not included in clause 24 but extended the limitation period for proceedings and, in any event, the 24 November 2008 letter commenced the expert determination;
(2) the claimant is estopped from raising jurisdictional challenges or has waived such challenges by not raising the matter with the expert until 30 March 2009;

(3) the court should stay the court proceedings until it is seen whether points on construction of contracts which cannot be dealt with under the expert determination under clause 24 arise, when the stay can if necessary be reconsidered.

Jurisdiction of the expert

12. I consider, first, the jurisdiction of the expert and whether the claimant has waived or is estopped from taking such a point. I shall then consider the effect of the litigation.

13. As a preliminary matter it is necessary to decide on the impact of the letter of 14 November 2007 on the rights of the parties. Mr Watthey submits that the letter of 14 November had the effect of extending the time within which claims could be brought until 6 December 2008 and that the right to refer the dispute to expert determination under clause 24 expired on that date. He says, as I have indicated, that there is no provision to extend time and therefore the defendant had to commence expert determination by 6 December 2008. He submits that the letter sent by Hammonds on 24 November 2008 did not commence the expert determination, which was only commenced by the application to the RICS.

14. Mr Lamont submits that the letter of 14 November 2007 had the effect of extending the limitation period in relation to any proceedings but did not affect the time within which expert determination had to be commenced under clause 24. In relation to limitation, it prevented the claimant from raising a limitation defence should proceedings be commenced by 6 December 2008. Any limitation defence in any event, he submitted, would not go to jurisdiction.

15. The letter of 14 November 2007 clearly refers to the dispute being referred to expert determination but raises concerns as to the impact of the Limitation Act 1980 upon the resolution of the dispute. It referred to the agreement of 6 December 2001 and says that it is possible that limitation might expire on 5 December 2007, whilst reserving a right for the defendant to contend that limitation might expire on a later date. It says that the parties agreed to extend the limitation period.

16. The express terms of the agreement in that letter are contained in paragraphs 1 and 2 in that letter. They appear to proceed on the basis that the Limitation Act 1980 applies to expert determination, a premise which, as I raised during argument, does not seem to be correct but which the parties accepted I do not need to decide to resolve in these proceedings. In any event the provision would apply to the limitation period in relation to any court proceedings. In paragraph 1 of the letter of 14 November 2007 the parties agreed that the limitation period was

extended by one year to 6 December 2008. In my judgment, on the premise that the limitation period of six years under section 5 of the Limitation Act 1980 might expire on 5 December 2007, the intention was to extend that period by one year to 6 December 2008. I do not consider that it imposed any contractual time bar on the ability of the defendant to commence an expert determination under clause 24 of the agreement so as to deprive an expert of jurisdiction if the expert determination was not commenced by 6 December 2008.

17. In paragraph 2 of the letter of 14 November 2007 the parties agreed that the claimant would not raise any limitation defence if any proceedings were commenced up to 6 December 2008. This again does not impose any contractual time bar but, in my judgment, prevents the claimant from raising a limitation defence if proceedings are brought up to 6 December 2008. I agree with Mr Lamont's submission that any limitation defence would not deprive the court or, if the Limitation Act 1980 applied, the expert from having jurisdiction. Rather it would be a matter for the court or the expert to deal with as a defence to any claim within the jurisdiction. However, on the facts of this case I also accept Mr Lamont's submission that, in any case, the defendant commenced the expert determination by the letter of 24 November 2008. I also note that they commenced court proceedings by the Part 7 Claim issued on 28 November 2008.

18. The letter of 24 November 2008 states on the first page that the defendant lacks confidence that the claimant could or was willing to fulfil his contractual undertakings. It continues by saying:

> "*In light thereof and given the continued deterioration of the property necessitating immediate attention, MSC is left with no option but to activate the formal dispute resolution machinery under the Agreement.*"

19. It then, in a paragraph dealing with ancillary matters, proposes an expert for agreement and says that if agreement cannot be reached the defendant will apply to the RICS under clause 24. I consider that in this way the defendant has commenced the procedure for an expert determination sufficient to stop any limitation period applying, if indeed such did apply to expert determination, contrary to the view which I expressed in argument. There is no express provision as to how expert determination is commenced under clause 24. I consider that commencement for any limitation period or time bar would necessarily be a unilateral act by a party and would take place at the first step. In this case proposing an expert for agreement is the necessary first step. In those circumstances the expert determination was, in my judgment, commenced by the letter dated 24 November

2008. Accordingly, the appointment of the expert was valid and there is no basis upon which the expert's jurisdiction can be challenged.

20. I do not therefore need to consider the alternative submission that the claimant is estopped from challenging jurisdiction or has waived any jurisdiction on the challenge. On the facts where the claimant had only dealt with preliminary matters in the letter of 11 March 2009 and had done nothing in relation to the appointment of the expert or made submissions in relation to the merits or substance of the dispute, I consider that such conduct would have been insufficient in any event to give rise to an estoppel or waiver.

The court proceedings

21. Mr Watthey submits that the defendant, by commencing the Part 7 Claim on 28 November 2008, unequivocally elected to resolve the dispute by way of litigation instead of expert determination. He says that by acknowledging service the claimant accepted an offer to resolve the dispute in court rather than by expert determination. He also relies on the agreement for further time to serve a Defence.

22. Mr Lamont says that there is no such agreement and he refers to correspondence with the expert in which the claimant states that the expert determination is the appropriate forum, if the expert has jurisdiction. He submits that, as described in correspondence, the court proceedings have been issued on a protective basis to prevent any limitation defence.

23. In my judgment, the defendant has not elected to pursue proceedings in court in preference to expert determination. At present it is conducting proceedings both before the expert and under the Part 7 Claim. While such parallel proceedings are undesirable, I do not consider that a party can be said to have agreed to one set of proceedings over the other, nor do I consider that the defendant has elected to pursue one set of proceedings to the exclusion of the other. The correspondence exchanged between RJWA Consulting and the expert demonstrates that the claimant considered that, subject to the limitation point, the expert, not the court, should decide the dispute. They clearly indicated that in the letter of 3 April 2009. It is right to say they then took the point that the defendant had elected court proceedings in their letter of 16 April 2009 when they had seen the Part 7 Claim and the Particulars of Claim. However, I do not consider that from any of that correspondence it can be said that there was a binding agreement on the claimant and the defendant to proceed by way of a Part 7 Claim. Nor do I consider that by taking the actions they did in issuing and serving the Part 7 Claim and Particulars of Claim the claimant has made any election.

24. As I have indicated, in principle, there is no objection to two sets of proceedings, although the court may intervene by staying the court proceedings or granting injunctions to prevent other proceedings from continuing in appropriate cases. In this case during the course of the hearing the defendant has now accepted that they should issue an application to stay the Part 7 Claim so that the matter can proceed by way of expert determination. Mr Lamont accepts that the position may have to be reviewed when the claimant has put in a response to the claim and the defendant can see whether points arise which are not within the expert determination. In such circumstances it may be necessary, he says, to seek to lift the stay.

25. I have come to the conclusion that as a result of what I have said above there are two valid sets of proceedings which potentially overlap and the court has to determine which set of proceedings should proceed. I accept that, although the court proceedings have proceeded to the stage of Particulars of Claim, they have been issued to protect the position on limitation.

26. In relation to expert determination I have been referred to the following passage from the speech of Lord Mustill in the House of Lords in Channel Tunnel Group v Balfour Beatty [1993] AC 334 at 353 in relation to a choice made by the parties as to how disputes should be dealt with:

> "*Having made this choice I believe that it is in accordance not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce that, having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellant should go. The fact that the appellants now find their chosen method too slow to suit their purpose is, to my way of thinking, quite beside the point.*"

27. In this case Mr Watthey submits that the court should proceed to hear the matter rather than impose a stay of the Part 7 Claim because litigation is in progress and the claim involves some £3.7 million, which is better suited to a court process than an expert determination. He also raised, in submissions in reply, the question of claims against third parties but I have no evidence as to this and it was not otherwise relied upon by the claimant.

28. Mr Lamont submits that the court should give effect to the express terms of the contract and points out that the expert is appointed and is

ready to proceed. As matters currently stand, the claimant has not put in a response to the claim by the defendant in the expert determination and, whilst matters may arise in terms of issues of the construction or interpretation of the agreement, that is not apparent at present.

29. This is a case where the Part 8 proceedings have been brought to prevent the expert determination continuing on grounds of lack of jurisdiction and I have rejected that application. The general position is that parties should be held to the terms of their contracts, but the court retains a discretion in each case. I am not persuaded in this case that the existence of the protective proceedings in court or the fact that, as in the Channel Tunnel case, the claimant now finds the chosen method of dispute resolution unsuitable, are factors which are so persuasive that they should outweigh the principle that the parties should be held to the agreed method of dispute resolution in accordance with clause 24 of the Agreement.

30. On balance I therefore consider that I should stay the court proceedings whilst the expert determination takes its course. Because matters might develop as a result of the claimant's response or other matters may arise in the expert determination, I will give liberty to apply to lift the stay should the position change. In the circumstances I do not make the declarations sought by the claimant and I will now hear argument on the form of order and any ancillary matters.