Case No: HT-2015-000437

Neutral Citation Number: [2018] EWHC 54 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 18 January 2018

Before :

THE HON MR JUSTICE COULSON

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Between :

Crown House Technologies Limited	**Claimant**
- and -	
Cardiff Commissioning Limited	**First Defendant**
- and -	
Emerson Network Power Limited	**Second Defendant**

- -
- -

Mr David Pliener (instructed by **BLM**) for the **Claimant**
The First Defendant did not appear and was not represented
Mr Gary Blaker QC (instructed by **W Legal Limited**) for the **Second Defendant**

Hearing date: 18 January 2018

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Judgment

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1. This is an application by the second defendant ("ENP") for summary judgment on its defence pursuant to CPR Part 24. The application is resisted by the claimant ("CHT").

2. The claim concerns eight air-conditioning units ("the Chiller Units") supplied by ENP and installed by CHT as main contractors, at a site in Gloucester. CHT sub-contracted the balancing and commissioning of the air-conditioning systems, which included the Chiller Units, to the first defendant ("CCL"). It is alleged that CCL themselves sub-contracted all or part of their work to a separate company, ("ESL"). There are separate proceedings against ESL, to be heard at the same time as the trial of this action in May 2018.

3. The eight Chiller Units were supplied in about October 2008. The commissioning work began in about December 2008, but for reasons which remain unclear, were delayed. There was a spell of cold weather and, in late December 2008/January 2009, a series of leaks in the Chiller Units was discovered. They were the result of the freezing of the residual water in the Chiller Units which caused the coils to distort and crack. This meant that the water had not been fully drained from the Chiller Units.

4. It is common ground that the main thrust of CHT's claim is against CCL and/or ESL for failing fully to drain the Chiller Units properly during the winter of 2008-2009. The claim against ENP is limited to three particular breaches:

   (a) An allegation that the User Manual supplied by ENP was in some way deficient or unclear;

   (b) An alleged failure to mark the Chiller Units to identify where the discharge valves were located; and

   (c) An alleged failure to resolve the problem promptly when it first arose in January 2009.

5. I deal with the issues between the parties in this way. In **Section 2** below, I identify the relevant principles of law. In **Section 3**, I address the question of delay, both generally, and in relation to CHT's evidence in particular. In **Sections 4**, **5** and **6** I set out the respective arguments on each of the three allegations. There is then a summary of my conclusions in **Section 7**.

2. THE APPLICABLE PRINCIPLES OF LAW

6. CHT have to demonstrate that their claim against ENP has a real prospect of success. That means they must have a case that is better than merely arguable: see ***ED&F Man Liquid Products Limited v Patel*** [2003] EWCA Civ. 472. The hearing of an application for summary judgment is not a summary trial and should not involve a mini-trial: see ***Swain v Hilman*** [2001] 1 All ER 91. So whilst at trial a party wins if it can demonstrate that its case is more probable, that is not true of a summary judgment application, where the criterion which the judge has to apply is the absence of reality:

see Lord Hobhouse of Woodborough in ***Three Rivers DC v Bank of England No. 3*** [2001] 2 All ER 513.

7. A claimant cannot run a case that is factually inconsistent: see ***Clarke v Marlborough Fine Art (London) and another*** [2002] 1 WLR 1731. At paragraph 21 of his judgment in that case, Patten J (as he then was), when discussing the importance of the statement of truth, said that it "was to discourage the pleading of cases which when settled were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial".

8. If it appears to the court that the claim may succeed, but it is improbable that it will do so, the court may make a conditional order pursuant to the Practice Direction Supplementing Part 24 at paragraphs 4.4 and 5.2. This will often take the form of requiring (in a case where it is the defendant who is seeking summary judgment) the claimant to give security for the defendant's costs. Guidance on this is provided by Simon Brown LJ (as he then was) in ***Olatawura v Abiloye*** [2002] EWCA Civ. 998. Both parties in this case put forward the possibility of a conditional order if I was against their primary submissions.

3. DELAY

3.1 Delays Generally

9. There was a good deal of material in the witness statements dealing with the question of the delays in this case. Although I do not find it necessary to reach any detailed conclusions on those matters, it is right to note that this case has not generally been pursued with any proper speed by CHT. The relevant events happened in early 2009, but the proceedings were not commenced until 20014, at the end of the limitation period. They have not thereafter been pursued with proper diligence, even though I acknowledge some delays by the TCC office in the listing of the CMC, which was eventually heard last September.

10. At the CMC I gave various directions leading to a trial in May 2018. The order I made has still not been sealed and there are outstanding issues relating to costs budgeting which have not been passed on to me. Further, there are complaints about CHT's failure to comply with some of the directions made at the CMC, and there is a further hearing next week to deal with that.

11. The general delays on the part of the claimant are relevant, in part because of the specific delays relating to the service of their evidence in response to this application.

3.2 Delays in the Provision of CHT's Witness Statement

12. This application was made on 13 November 2017. The second witness statement of Mr Loble was provided at the same time. Mr Loble then sought to reach an agreement with CHT's solicitors that would have seen the evidence in response being provided by 19 December 2017. That was a sensible proposal, but CHT's solicitors refused to agree. Instead, they sought to take advantage of the Christmas/New Year vacation.

13. Furthermore, it is quite clear from the evidence that they sought to ensure that ENP had the minimum amount of time to consider any evidence in response. It seems that CHT's solicitors were guided by the provision in CPR 24.5 that their evidence in response had to be filed "at least seven days before the summary judgment hearing" (i.e. the last possible date). That would have been the close of business on Wednesday 10 January 2018. Then, having deliberately left it to the last minute, CHT's solicitors were unable to serve the statement in time. The statement of Ms Saad was served after close of business on 11 January 2018 which means that it was deemed to be served on 12 January 2018, the date that, pursuant to CPR 24.5(b) ENP were supposed to put in their own evidence in response.

14. CHT therefore have to make an application for relief from sanctions. The relevant principles are set out in ***Denton v T H White*** [2014] EWCA Civ. 906. This involves a three stage test: whether the failure was serious and significant; whether there is good reason for the delay; and whether it is just and reasonable to allow CHT to rely on the late evidence.

15. In my view the delay was significant, because it reduced the amount of time that ENP had to consider the evidence in response. There was no good reason for the delay, which appeared to be based on the old-school approach of leaving everything until the last minute and then failing to achieve even that. However, I have concluded, with some reluctance, that it is just and reasonable to allow CHT to rely on the late evidence, particularly as, in his submissions, Mr Blaker QC fairly accepts that ENP has, for obvious reasons, "already had to consider Ms Saad's statement and had to respond to it".

16. I return to the issue of sanctions in **Section 7** below.

4. ALLEGATION 1: THE ALLEGED INADEQUACY OF THE MANUAL

17. The main allegation against ENP is that the Manual was insufficiently clear. On analysis, I have concluded that this allegation cannot be sustained at trial.

18. I first consider CHT's pleadings. Paragraph 17 of the Particulars of Claim (against CCL) expressly states that "as should have been evident from the layout of the coils and from the User Manual", full drainage required the opening of two sets of drainage valves, one just below the unit and others at a lower point still. Similarly, Paragraph 20 of the Particulars of Claim against ESL is predicated on the express pleading that the Manual was clear. And, at paragraph 14 of CHT's Reply to ENP's defence, CHT say that "it is admitted that a full and comprehensive analysis of the User Manual should have alerted" CCL and/or ESL "to the existence of the additional 'low-level' discharge valve and the need to drain the same".

19. On the face of the pleadings, therefore, it is plain that CHT's primary case against all parties is that the Manual was clear, and devoid of ambiguity.

20. A consideration of the Manual itself bears this out. The caution at the start says that the Manual has to be read carefully before any operations on the Units were carried out. Paragraph 1.3 stated that the Unit's "hydraulic circuit is equipped with drain plugs and open vent valves; the free-cooling coils are supplied dry to avoid possible

problems due to the frost in the storage period". Paragraph 3.1.1 required the installer to "place a drain valve at the lowest points in the circuit". Paragraph 3.2.1 stated:

> "In winter, if the system is stopped, the water inside the exchangers can freeze damaging the system irreparably; thus, it is recommended to use glycol mixtures (see following paragraphs: please consider the different outputs and absorption by the chiller, the pump sizing and the performance of the system terminals/conditioners) or drain the system completely, using the suitable cocks arranged in the exchangers and in the circuit, trying to drain the water residues blowing air in the lines."

21. In addition, the Manual included a drawing (figure 29), which showed both sets of drainage valves; the ones immediately below the Units, and the valves further down.

22. Thus, on the face of the words used in (and the drawings which formed part of) the Manual, the requirement to drain down the Chiller Units using both sets of valves would have been apparent to anyone reading the User Manual. So, in the light of the pleadings and the Manual itself, I need to ask: what is the alternative case; what is it based on; and how is such a case to be established at trial?

23. CHT's alternative case, as advanced at today's hearing, is that there was a ambiguity in the Manual because there were two places which provided information about valves. One indicated a valve at point 9, which was the lowest point of the hydraulic circuits and that was the valve that was used to drain the Chiller Units. However, there were also drawings which showed additional valves at the bottom of the coils which were located behind particular panels. It is therefore submitted – in the alternative – that the User Manual could have been potentially misleading.

24. Whilst, in a proper case, is is open to a claimant to plead its claims in the alternative, the basis of the alternative case here is impossible to discern. The original Claim Form was very general and alleged defects in the Units themselves, a case which has since been abandoned: this may suggest that CHT adopted a rather 'scattergun' approach to their original allegations. The alleged lack of clarity cannot be traced back to any event or any witness. In my experience it is usual for a claimant to plead something like an alleged lack of clarity within a Manual if – and only if – such an argument has been raised by those who had to install or commission the Units. That is manifestly not this case.

25. The absence of a proper basis for this alternative case is confirmed by the absence of any evidence to support the allegation. There is no expert evidence in this case, so the alternative assertion could only be supported by a witness of fact. But who? As Mr Pliener rightly conceded, CHT's witnesses will not (and cannot) say that the Manual was unclear, because it is their case against CCL and ESL that the Manual was perfectly clear. So Ms Saad's references to what she has been informed by Mr Eardley (a former employee of CHT) in paragraph 20 of her statement are nothing to the point. I also note that it is not suggested that Mr Eardley had any involvement at the time, so he is not a witness of fact in any event.

26. Critically, neither CCL or ESL will be adducing evidence that they were puzzled or misled by the Manual because each of them say, in robust terms, that the Manual was simply not provided to them by CHT. Their witnesses cannot give factual evidence that they were misled by something which they stoutly maintain they never even saw.

27. As a result of all these difficulties, the best that Mr Pliener was able to offer was the evidence which he hopes will be adduced in his cross-examination of the CCL and ESL witnesses. This is because CHT maintain that those organisations did have the Manual, and he will cross-examine their representatives accordingly. But as I pointed out to him, whilst that cross-examination may persuade the trial judge that CCL and ESL did have the Manual, it cannot advance a case about the alleged confusion as to what the Manual required, because that is an entirely separate point and cannot realistically be part of those witnesses' evidence.

28. In my judgment, therefore, this is a perfect example of a claimant who never had a proper basis for the plea in question, who is now waiting for something to turn up out of its cross-examination of another party's witnesses. That is impermissible. The alternative allegation about the Manual is contrary to CHT's case and not only unsupported but contradicted by every other party. For these reasons, I conclude that the first allegation lacks reality: it has no realistic prospect of success.

5. ALLEGATION 2: THE FAILURE TO MARK THE EQUIPMENT

29. This is not really a separate allegation. The suggestion is that the discharge valves behind the panels should have been marked. This would only have been even potentially necessary if the Manual was not clear. Accordingly it does not seem to me that this adds anything to the first allegation. In any event, it was common ground that there was no evidence to support this allegation. It cannot therefore succeed.

6. ALLEGATION 3: THE CRITICISMS OF ENP AFTER THE LEAKS WERE FIRST IDENTIFIED

30. Mr Blaker submits that there can be no sustainable criticism of ENP's conduct once the leaks were identified, in particular because they repeatedly stressed the need to drain down the Chiller Units. There are also causation arguments in relation to this allegation since, by this point, some, and maybe all, of the damage had occurred.

31. It is difficult to see what this allegation adds; in my view, it goes back to the first allegation, in the sense that CHT complain that, even after the problems first arose, ENP failed to point out that the second set of valves had not been operated.

32. I was shown the emails between CHT and ENP in January and February 2009. They demonstrate that ENP were repeatedly advising that the Chiller Units should be drained down, and offering to provide further assistance if it was required. CHT were also instructing the sub-contractors that the Units had to be drained down. Despite this, it appears from the minutes of 17 February that the Units had not been fully drained down. In the circumstances, it is impossible to see how that could be ENP's fault.

33. There is no question of any confusion on the part of CCL or ESL arising out of the Manual in January/February 2009 because, of course, they maintain that they did not

have it. And CHT cannot say that they did not know that both sets of valves had to be drained down, because it is their case that they knew that this was precisely what the Manual required.

34. In addition, there is the point about damage. 9 years after the event, Mr Pliener accepted that CHT had not identified what (if any) additional damage flowed from the events after the first leaks. So they cannot say that this third allegation, even if arguable, leads to any loss.

35. For all these reasons, therefore, I consider that this third allegation is also fanciful, and devoid of reality.

7. CONCLUSIONS

36. On my analysis, the case against ENP boils down to one issue only: whether the Manual should have done more to advertise/warn about the lower valves. For the reasons that I have given, I consider that this allegation is fanciful, and has no realistic prospect of success. The highest that Mr Pliener himself could put it was, "we cannot be sure how this matter will play out at trial". I therefore grant judgment under Part 24 to the second defendant, ENP.

37. That result is also justified when considered against the backdrop of CHT's conduct of the case generally, including the delays in the provision of the relevant witness statement in response to this application. In my view, the time has come for the claim against ENP to be put out of its misery.

38. If I was wrong about that, and the claim had just about got over the reality line, then it would have been necessary to make a conditional order. *Prima facie*, it would have been appropriate to order the claimant, CHT, to pay into court the costs which ENP were likely to incur from now until the end of the trial. That would have been a substantial sum. Of course, because of my primary finding, it is unnecessary to consider that matter further.