Neutral Citation Number: [2021] EWHC 3250 (Comm)

Case No: CL-2020-000638

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/12/2021

Before :

SIR NIGEL TEARE

Sitting As A Judge Of The High Court

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Between :

Elite Insurance Company Limited **Cla**

(In Administration)

- and -

(i) BCR Legal Group Limited

(ii) CRL Management Limited **Defe**

(iii) BCR Global Risks Limited

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Lesley Anderson QC and Ben Harding (instructed by **Athena Solicitors LLP T/A Athena Law**) for the **First and Third Defendants**

Neil Moody QC and Timothy Killen (instructed by **Kennedys Law LLP**) for the **Claimant**

Hearing dates: 25 November 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be 02 December 2021 at 10:00.”

Sir Nigel Teare :

1.
This is an application by a defendant to strike out parts of a claim or for summary judgment in respect of parts of a claim. The application is made in a case concerning a dispute between an insurer (now in administration) and an agent who procured insurance business for the insurer pursuant to a General Binding Authority. The area of insurance involved is latent defect insurance in respect of newly built properties.

2.
The burden on a defendant making such an application is well-known. A claim can be struck out if it discloses no reasonable grounds for bringing the claim (see CPR Rule 3.4(2)(a)) and summary judgment can only be given if the claim has no realistic prospect of success. The court must be careful not to conduct a mini-trial and must bear in mind not only the evidence presently before the court but also such evidence as may reasonably be expected to be available at trial. The court should hesitate before disposing of a case summarily where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence available to a trial judge and so affect the outcome of the case (see Easyair Limited v Opal Telecom Limited[2009] EWHC 339 (Ch) at paragraph 15 per Lewison J).

3.
In the present case the General Binding Authority which has given rise to the dispute was only in force or active for a short period between 2013 and 2014. Yet the claim form was not issued until 28 September 2020. That circumstance has given rise to limitation defences and they form most, but not all, of the subject matter of the applications before the court.

The General Binding Authority

4.
The Claimant, Elite, entered into a General Binding Authority with the First Defendant, BCR, (described as “the Coverholder”) on or about 19 May 2013. For the purposes of this application the General Binding Authority is assumed to be valid and effective. Section 4 was entitled Grant of Authority and Risk Transfer. By clause 4.1 Elite, as insurer, authorised the Coverholder to bind insurance for the insurer’s account. Clause 4.2 obliged the Coverholder to comply with any direction or requirement given by the insurer. Clause 4.3 provided as follows:

“In respect of every insurance bound, the Coverholder has a duty to:-

4.3.1 issue certificates of insurance……..

4.3.2 collect and process premiums ……”

5.
Section 8 was entitled Period of Insurance Bound and provided by clause 8.1 that no insurance shall be bound for a period greater than that stated in the Schedule.

6.
Section 25 made provision for borderaux accounts and settlements. Thus all premiums were to be allocated and declared by written and paid premium borderaux.

7.

The Schedule to the General Binding Authority provided that the period of insurances bound was 120 months.

8.
By endorsement no.1 the limit of indemnity for any one residential property was £5 million.

The policy

9.
Elite's policy of insurance described the insurance as "10 Year Structural Defects Insurance Policy for Residential Property". In order to be valid the Insured had to have a signed Insurance Period Certificate. The "policyholder" was described as the "purchaser or owner of the property".

The Appointed Representative Agreement

10.
BCR chose to perform its duties under the General Binding Authority through the agency of the Second Defendant, CRL, pursuant to an Appointed Representative Agreement dated 21 June 2013. A clause entitled "Background" provided by clause 1 that BCR had appointed CRL as "an Appointed Representative". That was defined as "an appointed representative as defined by the Financial Services and Markets Act 2000". Clause 3 of the "Background" clause provided that CRL "will provide administrative services in connection with general Insurance Policies placed by [BCR] with insurers".

11.
Clause 2.1 in the body of the agreement provided that:

"[BCR] appoints [CRL] as an Appointed Representative to provide administrative services in connection with general Insurance Policies sold under arrangements between [BCR] and the Insurers and [CRL] agrees to accept such appointment."

12.
Clause 2.2 provided that:

"[CRL] is not permitted to conduct any activities other than Regulated Activities under this appointment."

13.
Regulated Activity was defined as "the act of insurance mediation carried out in relation to a Policy including but not limited to making arrangements to bring about contracts of general insurance and the administration of Policies."

14.
By an Addendum BCR authorised CRL to advise, arrange or assist in the administration of a contract of insurance and BCR accepted "responsibility for the activities of [CRL] in carrying on the whole or part of such business."

CRL's Membership Terms and Conditions Handbook

15.
CRL is a party to this action but was not involved in this application. There is no evidence from CRL at present. It appears to be the case that CRL dealt with developers of residential properties on the terms of a document entitled Membership Terms and Conditions Handbook. I have been told that CRL is understood to have conducted its business as follows.

16.
CRL maintained a Construction Register which builders or developers could apply to join. Once accepted the builder or developer could apply for membership of a scheme, one such scheme being the 10 year latent defects insurance provided by Elite. If the builder or developer wished to register for a scheme it had to make a “notification”. If CRL accepted the notification it would issue a “quotation” which would refer to, inter alia, a premium. The premium would be paid to CRL who would pass it on to BCR who would in turn account to Elite for the premium by means of borderaux. Upon completion of the building it had to be inspected and only if it did so would CRL then issue an Insurance Period Certificate to the purchaser or owner of the property.

17.
There is a dispute between the parties as to whether the insured could only be the purchaser of a residential property from the builder/developer or whether the builder/developer could also be an assured. The policy did not give a clear answer to this dispute. The “policyholder” was defined as the “purchaser or owner of the property”.

Termination of the General Binding Authority

18.
The General Binding Authority was terminated by Elite from 29 September 2014. An endorsement provided that Elite granted BCR the right “to issue and administer policies of insurance, under this agreement, for risks quoted and bound (acceptance from the client and payment received and evidenced by premiums having been paid to Elite within the appropriate monthly scheme borderaux) prior to 28 September 2014 .....”.

Payment of premium and issue of certificates of insurance

19.
BCR has adduced evidence (summarised in the Chronology provided to the court) to the effect that the premiums in respect of the insurances in question were paid to Elite more than 6 years before the issue of proceedings in this action. This was not accepted by counsel for Elite but no contrary evidence by Elite was adduced on this. If Elite had evidence that relevant premiums were paid less than 6 years before the issue of proceedings such evidence would have been produced on this application. There is therefore no reason to suppose that any such evidence will be available at trial.

20.
It was common ground (save with regard to one development) that the relevant certificates were all issued less than 6 years before the issue of proceedings in this action. Elite had conceded that in relation to one development the certificates had been issued more than 6 years before the issue of proceedings but, by reason of certain evidence as to backdating of certificates by CRL, Elite applied to withdraw this concession. I shall consider that application later in this judgment.

Elite’s claim

21.
Elite alleges that in breach of the General Binding Authority and in breach of a common law duty of care BCR bound Elite to insure properties to which BCR had not been permitted to bind Elite. Thus properties worth more than £5 million had been bound, properties which were non-residential had been bound, and properties had been bound without having been inspected. Such breaches of contract and a common law duty of care were alleged to have caused damage to Elite. The damage

pleaded falls into two parts. First, under paragraph 27.1 of the Particulars of Claim, indemnities paid out in respect of certain claims and fees and expenses incurred in respect of certain other insured properties are claimed. Second, under paragraph 28 it is alleged that damage was suffered by Elite in that “its book of business has suffered a diminution in value by reason of increased future liabilities”. There is also a complaint about premium having been miscalculated which is alleged to have caused loss estimated to have been £193,486.

22.
These claims are the subject of BCR’s application. Elite has other claims which are not the subject of BCR’s application.

BCR’s limitation defence

23.
The limitation period of 6 years for claims for breach of contract runs from the date of breach. The limitation period of 6 years for claims in tort runs from the date when Elite first suffered damage.

24.
BCR maintains (see paragraph 39 of counsel’s skeleton argument) that the alleged breach of contract occurred, at the latest, when the offer of insurance by CRL was accepted and the premium paid to CRL. “By that point at the latest CRL had exceeded the terms of the authority conferred by the Binder Agreement and led to a situation where Elite was bound by a CRL contract of insurance in respect of a development/property where it should not have been.”

25.
BCR maintains (see paragraph 42 of counsel’s skeleton argument) that Elite first suffered damage when “it was bound by a contract of insurance and so exposed to the issue of an insurance certificate in due course.”

26.
If those contentions are correct BCR maintains that Elite has no realistic prospect of recovering damages in respect of the failure to comply with the £5 million limit or the residential requirement because the relevant breach occurred, and damage was first suffered, more than 6 years before the issue of proceedings by Elite. The same argument is advanced in relation to the alleged miscalculation of premium. (A different argument, see below, is run in relation to the alleged failure to inspect.)

27.
In response to this argument Elite maintains (see paragraph 2.2 of counsel’s skeleton argument) that the question of limitation is fact-sensitive and unsuited to summary determination. A fuller investigation of the facts is likely to show that Elite’s causes of action in both tort and contract did not accrue until, at the earliest, the issue of certificates of insurance, so that its claims are not time-barred. It was further said (see paragraph 47.1 of counsel’s skeleton argument) that the question of when Elite was “bound” to the various insurances is a question of fact which will be dependent upon disclosure by CRL and its witness statements. It was also said (see paragraph 47.2 of counsel’s skeleton argument) that the question of damage in economic loss cases is fact sensitive (see Maharaj v Johnson[2015] 5 LRC 592 at paragraph 19 and the reference to “no transaction” cases such as the present) and that the court is likely to have more relevant evidence at trial. Finally, it is said that BCR has a continuing duty of care and that there is likely to be expert evidence on such a duty at trial.

28.

BCR's case on limitation appears to me to be very strong. Its breach of contract can be said, with ease, to have occurred when CRL provided a quotation and accepted premium in respect of properties which exceeded £5 million in value or were non-residential. That all occurred more than 6 years before the issue of proceedings. Similarly, Elite can be said to have suffered damage at the same time by reason of being exposed at that time to an obligation, in the event that the property passed the required inspections, to insure the owner against latent defects for a period of 10 years from the date of the insurance certificate. Being exposed to such an obligation, even if contingent, is a liability which amounts to damage for this purpose; see Nykredit Mortgage Bank v Edward Erdman Group [1998] 1 AER 305 at p.308 c-e per Lord Nicholls. Further, the analysis in Maharaj relied upon by Elite may be put to one side because Maharaj did not concern a case where, as here, the wrongdoing gives rise to a liability. BCR's case also appears to be strongly supported by the endorsement to the General Binding Authority which provides a definition of "bound" entirely consistent with BCR's case.

29.
However, the party most closely involved with the binding of the insurances is CRL. Whilst CRL's handbook is before the court, the documents showing CRL's dealings with builders and developers when the latter make a "notification" and CRL provides a "quotation" are not before the court. Nor are the documents showing CRL's dealings with purchasers to whom the certificates are issued before the court. I have asked myself whether I can be confident that disclosure and evidence from CRL will not have a bearing upon the issue as to when BCR's breach occurred or when Elite incurred an obligation or liability.

30.
If, as contended by Elite but which cannot be determined on this occasion, the insurance for latent defects is only provided to the purchasers and not to the builders/developers responsible for the latent defects, then Elite's contention that it is only "at risk" or "bound" when the certificate is issued gains some traction. CRL's evidence and disclosure may therefore be important in order to ensure a fair and just disposal of Elite's claim and the limitation defence which has been raised. Whilst it is perhaps much more likely than not that such documents or evidence will not undermine BCR's limitation defence (because, as it was put by counsel for BCR, the questions of breach of contract and damage depend upon the true construction of the General Binding Authority), I cannot say with confidence that they will not do so. The authorities urge the court to hesitate before making a final decision without a trial lest an injustice be caused.

31.
This is a case which involves an unusual form of insurance (counsel for Elite suggested it was sui generis) because it did not just involve an insurer and an insured but it also involved a third party, the builder/developer. There is also an unresolved dispute as to whether the builder/developer was or could be an insured. It is also a case which, on the insurer's side, involves three parties, Elite, BCR and CRL. Although counsel for BCR submitted that the limitation defence was clear and free of doubt the circumstances of the case can fairly be described as complex rather than simple. These are all reasons why it is appropriate to hesitate before making a final decision without a trial.

32.
I have reached the conclusion that I cannot say that Elite's prospects of defeating the limitation defence are no more than fanciful. It may be said with force that Elite is more likely to lose than win the limitation argument. But that is not enough. I must therefore decline to give summary judgment in favour of BCR with regard to the insurance of properties worth more than £5 million or which were not residential.

33.
With regard to the miscalculated premiums, the breach and loss were said to have occurred when the premium was paid. I am not sure counsel for Elite responded to this point but Mr. Welfare did, at paragraph 49 of his witness statement. He said that up until the certificate is issued the premium can be revised or returned and it is only at that stage that Elite is permitted to keep any premium paid. Again, I am doubtful that this is correct but evidence from CRL may bear on this point and so I decline to give summary judgment on this point also. There was also an application to strike out the complaint about miscalculated premium on the ground that the claim has not been particularised. It is odd that it has not been particularised given that it has been estimated in the precise sum of £193,486. But given that strike out is a remedy of last resort and that a precise estimate of the loss has been claimed I do not consider that the claim should be struck out.

The failure to inspect

34.
BCR's case is that the Particulars of Claim do not disclose reasonable grounds for bringing this claim either in contract or in tort and that the claims in contract and in tort should therefore be struck out.

35.
The claim in contract is pleaded at paragraph 25.1.5 of the Particulars of Claim. The issue of certificates in respect of properties which had not been subject to any or any sufficient inspection is said to have been a breach of clause 4.2 of the General Binding Authority or of certain implied duties of care. The complaint made by BCR is that what has not been pleaded is any term of the General Binding Authority which requires BCR to carry out inspections; see paragraph 60 of counsel's skeleton argument.

36.
Clause 4.2 obliged the Coverholder, BCR, to comply with any direction or requirement given by the Claimant. It is said that Elite has not identified any relevant direction or requirement. However, Elite alleged in paragraph 20 of the Claim that "the process which BCR (and CRL as BCR's AR) were to follow in writing policies on Elite's behalf was that: ……subject to the development passing periodic inspections and being satisfactorily constructed (such inspections to be arranged and/or carried out by BCR and/or CRL as BCR's AR), on completion, BCR (or CRL as BCR's AR) was to issue a certificate from which point Elite was "on risk" ".

37.
It would no doubt have been clearer had Elite said in terms that the required process was a direction or requirement within clause 4.2 but, on my understanding of the Claim, that is what is being said. I therefore do not accept that the pleading does not disclose reasonable grounds for bringing the claim.

38.
I note that BCR's case is that CRL carried out inspections on its own account and for a fee (described as "technical fees"). However, this is a factual dispute which cannot be resolved at this time. It must await trial and in particular evidence from CRL.

39.
The claim in tort is pleaded in paragraph 25.2 of the Claim. The same particulars are relied upon as are relied upon to support the allegation of a breach of contract. For the reasons I have just given this pleading discloses reasonable grounds for bringing the claim.

40.
The Particulars of Claim go on to allege “for the avoidance of doubt” that “as BCR was acting as CRL’s principal, and CRL as BCR’s AR, BCR is itself primarily liable at common law for any breach or breaches committed by CRL whilst CRL was so acting as BCR’s AR.”

41.
This further pleading is said to have no real prospect of success because any breach of duty owed by CRL to BCR was not whilst CRL was acting as BCR’s AR. Four reasons are given for this in paragraph 68(a)-(d) of counsel’s skeleton argument. My understanding of them is that CRL was not permitted to carry out any activities other than Regulated Activities as defined. Regulated activities were defined as being “the act of Insurance mediation carried out in relation to a policy including but not limited to making arrangements to bring about contracts of general insurance and the administration of policies.” It was said that neither this nor the terms of the addendum to the AR Agreement included or involved the inspection of properties.

42.
The definition of “Regulated Activity” is arguably wide enough to extend to the inspection of properties where inspection was required prior to the issuance of an insurance certificate. An inspection for such a purpose is, arguably, “an arrangement to bring about a contract of insurance”. Thus inspection could well be a Regulated Activity within the meaning of the AR Agreement. It was stressed in oral argument that inspection must be within the range of activities delegated by BCR to CRL as its AR having regard to the meaning and scope of an AR under section 39 of FMSA 2000. That may well be so. It is supported by the definition of Appointed Representative in the AR Agreement. But the wide definition of Regulated Activity in the AR Agreement must also be considered and that is best done at trial with the benefit of evidence from CRL as to the work they did to bring about a contract of insurance.

43.
It was then submitted (see paragraph 70 of counsel’s skeleton argument) that CRL was carrying out its own activity when carrying out inspections for which BCR was not responsible. In this regard reference was made to Anderson v Sense[2020] 1 BCLC 555 at paragraphs 58-65. But this is a question of fact which can only be determined at trial (as was the case in Anderson v Sense).

44.
It therefore seems to be that there are reasonable grounds for the “inspection” claim have been brought and that it cannot be said that Elite has no more than a fanciful prospect of it succeeding. I am therefore unable to accept that the “inspection” claim should either be struck out or be the subject of summary judgment.

<u>The concession in connection with units 1-40 of the Canterbury Student Village</u>

45.
Mr. Welfare conceded on behalf of Elite in his witness statement that the claim in respect of units 1-40 of the Canterbury Student Village development was out of time. However, as explained in his second witness statement he wishes to withdraw this concession because of evidence which has come to light that CRL backdated insurance certificates in relation to another insurer. He wishes to investigate whether CRL backdated the certificates in respect of units; see paragraphs 10-17 of his second witness statement. Perhaps surprisingly, BCR opposes the withdrawal of the concession.

46.

The court's power to permit the withdrawal of a concession is governed by PD 14 paragraph 7.2 which is addressed at length in a supplementary skeleton argument prepared by counsel for BCR. I have noted all that is said but this appears to be a clear case for permitting the withdrawal of a concession. The grounds of the application are sound. New evidence has come to light. It may relate to another insurer but it is understandable that Elite wishes to investigate the possibility that CRL may have backdated the certificates in relation to units 1-40. There is no evidence of any prejudice to BCR if the concession is withdrawn and the application is made at an early stage in the proceedings. It is in the interests of the administration of justice that Elite be permitted to investigate whether CRL backdated the certificates in question.

The joinder of BCR Global as Third Defendant

47.
On 15 January 2021 Elite wrote a letter to BCR Legal Group Limited advising that Elite would shortly be serving proceedings on BCR Legal Group Limited on the basis that it was party to the General Binding Authority. On 22 January 2021 BCR Legal Group Limited replied. Several points were made, including the limitation defence. With regard to "coverholder arrangements" it was noted that some years earlier in 2015 Elite had said that BCR Global Risks Limited was the party which signed the General Binding Authority. BCR Legal Group Limited went on to say: "Please ensure that any proceedings are served against BCR Global Risks Limited and not against BCR Legal Group Limited. If proceedings are served in error against BCR Legal Group Limited they will naturally be struck out."

48.
Elite joined BCR Global Risks Limited to the proceedings but made clear (see paragraphs 5 and 6 of the Particulars of Claim) that it did so because of BCR Legal Group Limited's letter of 22 January 2021. When the Defence was served it was said that the Claim disclosed no reasonable grounds for proceeding against BCR Global Risks Limited.

49.
The present position is that all agree that BCR Global Risks Limited has no liability but there is a dispute as to whether Elite should bear the wasted costs of joining BCR Global Risks Limited or whether BCR Legal Group Limited should pay such costs. I cannot imagine that the costs are substantial. It is surprising that the parties have been unable to dispose of this matter without the assistance of the court.

50.
BCR Legal Group Limited says that Elite should bear those costs because there was no basis for joining BCR Global Risks Limited and that BCR Global Risks Limited has "seen off the claim against it". Elite says that BCR Legal Group should pay the costs because BCR Global Risks Limited was only joined because of what BCR Legal Group had said in its letter dated 22 January 2021. Now that BCR Legal Group Limited accepts that proceedings can only be brought against it Elite is willing to withdraw the claim against BCR Global Risks Limited.

51.
It seems to me that BCR Legal Group Limited can hardly complain, in the light of its letter dated 22 January 2021, that Elite joined both BCR companies. Quite why BCR Legal Group Limited demanded that BCR Global Risks Limited be sued when there was no basis for doing so is unclear. Elite's 5 year old letter provides no justification. The Schedule to the General Binding Authority clearly states that the Coverholder is BCR Legal Group Limited. That is now accepted by all. Elite was put in a difficult position. If it chose to sue BCR Legal Group Limited alone, as it intended to do, it had been told that

there would be an application strike out the claim. Yet that company had signed the General Binding Authority. The safe (and apparently cost effective) course was, in the light of the letter dated 22 January 2021, to join both companies. Elite having done so, BCR Legal Group Limited then changed its mind as to which company should be sued. Elite was then willing to withdraw its claim against BCR Global Risks Limited and proceed only against BCR Legal Group Limited as had been its intention in its letter dated 15 January 2021.

52.
I think that the just order is that BCR Legal Group Limited pay Elite's wasted costs of having joined BCR Global Risks Limited. Elite only joined BCR Global Risks Limited because of the conduct of BCR Legal Group Limited.