Case No: HT-10-332
Neutral Citation Number: [2010] EWHC 3189 (TCC)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd December 2010

Before :

THE HONOURABLE MR JUSTICE COULSON

- -

Between :

PANTELLI ASSOCIATES LIMITED **Cla**

- and -

CORPORATE CITY DEVELOPMENTS NUMBER TWO LIMITED **Defe**

- -
- -

Mr Richard Coplin (instructed by **CMS Cameron McKenna**) for the **Claimant**

Mr Crispin Winser (instructed by **GH Canfield LLP**) for the **Defendant**

Hearing date: 26 November 2010

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Judgment

Mr Justice Coulson :

(1) Introduction

1.
The Claimant (“Pantelli”), a firm of quantity surveyors, seeks some £98,000 by way of unpaid fees from the Defendant (“CCD”) arising out of two building projects in North London. The claim is made pursuant to and/or as damages for breach of a compromise agreement dated 25 February 2009. Following commencement of proceedings in April 2010, CCD served a Defence and Counterclaim which raised, for the first time, allegations of professional negligence and a counterclaim for £300,000. Pursuant to an unless order, made by consent on 6 October 2010, CCD agreed to provide proper particulars of the allegations of negligence, causation and loss, by way of an application to amend, to be made no later than 12 November 2010. If they failed to do so, that part of the Defence and Counterclaim alleging poor performance and resulting loss would be struck out.

2.
At the hearing on 26 November 2010, CCD made their application to amend. In so far as those proposed amendments concerned the claim for professional negligence, Pantelli opposed them, saying

that CCD had not provided proper particulars and had therefore failed to comply with the terms of the agreed unless order. The application raised a potentially important point as to the proper practice for the pleading of claims for professional negligence. As a result, although I gave a ruling with brief reasons at the hearing on 26 November, I said that I would provide more detailed reasons by way of this written judgment.

(2) Background

3.
The original contracts between Pantelli and CCD were made in writing on 27 September 2007. The work was carried out over the next few months. Ultimately, neither project received planning permission. No fees were paid to Pantelli and a letter before action was sent on 21 July 2008. Subsequently, a statutory demand was served.

4.
Following a meeting in February 2009, the fees claim was the subject of a written compromise agreement, set out in Pantelli's letter of 25 February 2009. The letter was countersigned by CCD.

5.
Unhappily, the terms of the compromise agreement were not honoured at all by CCD, who now maintain that, for reasons which it is unnecessary for me to analyse, the compromise agreement was in some way not binding and/or superseded by a later agreement (although no fees were paid pursuant to that agreement either). In April 2010, Pantelli commenced these proceedings in the QBD. In June, CCD served a Defence and Counterclaim which raised, for the first time, vague allegations of poor performance and professional negligence. The counterclaim said to arise in consequence was put in the sum of £300,000. Following the transfer of the case to the TCC in September 2010, a Case Management Conference was fixed for 7th October. At that CMC, Pantelli had given notice that they were going to raise the wholly inadequate nature of CCD's pleading and seek an unless order in connection with it.

6.
The issue as to the inadequacy of the original pleading was discussed by the solicitors in the run-up to the CMC, and two days before the hearing, on 5th October, CCD agreed to provide proper particulars of the allegations. Thus, a proposed order was agreed by consent on 5th October, and formalised by Akenhead J on 6th October 2010. The order was in these terms:

"Unless by 4pm on 12 November 2010 the Defendant do make an application to amend its Defence and Counterclaim properly explaining the nature of its Defence and Counterclaim and providing proper particulars of any alleged defence or cause of action, paragraphs 6, 7, 9(e), 10(e), 14-17 and 20-22 (including the prayer) of the Defendant's Defence and Counterclaim shall be struck out."

The paragraphs specifically identified in the order were those setting out the case, such as it was, as to professional negligence, causation and loss.

7.
For the avoidance of doubt, I should say that, although the unless order in this case was made by consent, I am in no doubt that such an order was appropriate in all the circumstances. In **Marcan Shipping (London) Ltd v Kefalas** [2007] EWCA Civ 463, [2007] 1 WLR 1864, the Court of Appeal stressed that an unless order should only be made in circumstances where the court has carefully considered whether such a sanction was appropriate in all the circumstances of the case. Here, a

large counterclaim had been raised by CCD very late in the day, on the back of inadequate allegations of professional negligence. In view of CCD's delays, both before and after the service of the claim form, an unless order was appropriate in all the circumstances.

(3) The Proposed Amendments

8.
The proposed amendments have been put forward by way of a completely new document entitled 'Amended Defence and Counterclaim'. Quite properly, Mr Coplin does not object to that document as a matter of form; neither does he object to any of the amendments other than those which purport to set up the counterclaim for £300,000 based on allegations of professional negligence.

9.
For the purposes of this Judgment, it is unnecessary to set out the controversial paragraphs in full. However, it is instructive to set out parts of paragraph 16, which comprise the allegations of negligence, and the whole of paragraph 36, which is the entirety of CCD's pleaded case as to causation and loss.

"Performance

16. Paragraph 10 is denied. It is averred that the Claimant failed to perform to the contractual standard and is in breach of the QS Contracts and the PM Contracts.

PARTICULARS OF BREACH OF THE QS CONTRACTS

16.1 Failing adequately or at all to identify or determine the Defendant's initial requirements and subsequently develop the full brief.

16.2 Failing adequately or at all to advise on feasibility and procurement.

16.3 Failing adequately or at all to establish the Defendant's order of priorities for quality, time and cost.

16.4 Failing to prepare adequate and/or accurate initial budget estimates.

16.5 Failing to prepare or develop a proper and/or accurate preliminary cost plan.

…

PARTICULARS OF BREACH OF THE PM CONTRACTS

16.13 Failing to select or appoint appropriate consultants.

16.14 Failing adequately or at all to co-ordinate and review the progress of design work.

16.15 Failing adequately or at all to facilitate communications between the Defendant and the Consultants.

…

36. As a result of the Claimant's breaches of the QS Contracts and the PM Contracts, the Defendant has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

36.1 The Defendant has incurred additional and/or wasted costs of approximately £300,000. These include the costs of engaging additional consultants including structural engineers, CMP consultants and transport consultants.

36.2 As a result of the delay to the projects, the Defendant has incurred additional costs servicing loans for an extended period."

10.
Mr Coplin's principal criticism of the allegations of professional negligence at paragraph 16 is that they read as if the pleader had simply taken each relevant contract term and then added the words "failing to" or "failing adequately or at all to" as a prefix to each obligation, thus turning the obligation into a breach of professional negligence. In his submissions on behalf of CCD, Mr Winser candidly accepted that that is precisely what he had done. By way of mitigation, Mr Winser said that, in drafting the proposed amendments, he had been hampered by the absence of any expert advice as to whether – and if so how – Pantelli had been negligent or otherwise acted in breach of contract.

(4) Proper Particulars

11.
CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are 'the facts' relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made.

12.
It is plain that, on any view, the amendments contained in paragraph 16 of the Amended Defence and Counterclaim do not begin to meet the test in r.16.4(1)(a). It is impossible for anyone to work out from those generalised and generic allegations what particular matters were being alleged against Pantelli. It would be impossible for a solicitor to take a witness statement from those involved in providing the services in question that could hope to meet these points, because no details have been provided for a prospective witness to accept or dispute. Accordingly, paragraph 16 is not a proper pleading of a case of professional negligence.

13.
Similarly, paragraph 36 is not a proper pleading of causation and loss. It is impossible to work out from that terse summary what facts CCD rely on in support of their contention that a particular breach or breaches has given rise to a particular head of loss. There is no answer to the question: but for the negligence, what would have happened and why? The damages claimed are wholly unparticularised. Again, therefore, paragraph 36 does not comply with r.16.4(1)(a).

14.
If the proposed Amended Defence and Counterclaim had been provided originally, then it is possible that CCD would have been entitled to argue that, rather than the claim being struck out, Pantelli's remedy lay in making a request under CPR Part 18 for such particulars as "are reasonably necessary and proportionate to enable the first party [Pantelli] to prepare his own case or to understand the case

he has to meet". (See 18PD 1.2.) Whilst I deprecate this practice (it encourages the claimant to have two attempts at pleading a proper case, and gives rise to delay and wasted costs), it is a fact of life that, in the first instance, a court is more likely to order the provision of proper particulars than to strike out the claim. But of course, making just such a request is what Pantelli originally did prior to the first CMC. It was that request for particulars that gave rise to the agreed unless order.

15.
Accordingly, it is no answer to the submission that CCD have failed to provide proper particulars of the allegations of professional negligence to argue now, as Mr Winser endeavoured to do, that CCD would be prepared to provide proper particulars under Part 18. They have been given that opportunity by the express terms of the unless order of 6th October, and they have failed to take it. In the absence of any application by Mr Winser for relief against forfeiture in accordance with CPR Part 3, it seems to me plain that the proposed amendments at paragraphs 16 and 36 are hopelessly inadequate and should be struck out in accordance with the terms of the unless order.

(5) Expert Input

16.
There is a second, separate reason why I am in no doubt that those parts of this Amended Defence and Counterclaim that purport to be allegations of professional negligence should be struck out. That is because, even though the work that is now the subject of these purported allegations was carried out three years ago, there is no expert evidence of any kind to suggest that that work was carried out inadequately, or was in some way below the standard to be expected of an ordinarily competent quantity surveyor. Not only is it simply not good enough to turn a positive contractual obligation into an allegation of professional negligence by adding the words "failing to" to the obligation, but it is also wholly inappropriate to do so in circumstances where there is no expert input to allow CCD to make such an allegation in the first place.

17.
Save in cases of solicitors' negligence where the Court of Appeal has said that it is unnecessary (see **Brown v Gould & Swayne** [1996] 1 PNLR 130) and the sort of exceptional case summarised at paragraph 6-009 – 6-011 of **Jackson & Powell**, Sixth Edition, which does not arise here, it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Part 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.

18.
On a related point, also referred to during the course of argument, I note that the Code of Conduct at paragraph 704 prevents a barrister from drafting any document which contains "any statement or fact or contention which is not supported by the lay client or by his instructions [or] any contention which he does not consider to be properly arguable". Since an allegation that a professional fell below the standard to be expected of his profession is not a matter which can be supported by a lay client, and since a barrister pleading a case in professional negligence without expert input cannot know whether the allegations are properly arguable or not, I consider that paragraph 704 of the Code is entirely consistent with the usual practice which I have set out in paragraphs 16 and 17 above.

19.

In the present case, although this is a claim that has been in existence for some years, CCD have chosen not to avail themselves of any expert input to support their allegations of negligence. There is no explanation for that failure. It is wrong in law and practice to make such unsupported allegations in this way, and I regret that they were ever made. In the light of the terms of the agreed unless order, they must be struck out.

(6) Effect

20.
At the hearing on 26 November 2010, CCD seemed unclear as to the effect of the order that the allegations of professional negligence would be struck out in accordance with the order of 6th October. At one point, Mr Winser asked for permission to call expert evidence, in order to suggest that Pantelli had failed to carry out their obligations properly, with the result that their fees claim might then be reduced. As I pointed out to him during the course of argument, and reiterate now, that would be a wholly illegitimate exercise. In the absence of any pleading of inadequacy or failure on the part of Pantelli, it is simply not open to CCD to challenge the fees claim on such grounds.

21.
Mr Winser argued that it was open to him to put Pantelli to proof of their fees claim. So it is. But that process would be limited to cross-examining them on any controversial matter of fact, such as whether or not a particular task was in fact completed, or how long a specific element of the professional services took to carry out. Putting a professional to proof of the facts which underpin his claim for professional fees does not permit an employer to raise unpleaded criticisms of the services provided by that professional in the hope of reducing the sums claimed.

(7) Conclusions

22.
For the reasons set out above, on 26th November I struck out the allegations of professional negligence and the counterclaim for £300,000. The only remaining issue in the case, in addition to those concerned with the validity of the compromise agreement, is the extent to which, on the facts, the fees claim may be overstated. It is not open to CCD to make any unpleaded criticisms of Pantelli's performance in order to try and reduce this longstanding fees claim.