Case No: HT-2013-000032
Neutral Citation Number: [2016] EWHC 2045 (TCC)

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

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

Date: 06/10/2016

Before :

MR JUSTICE EDWARDS-STUART

- -

Between :

Lloyds Bank plc **Cla**

- and -

McBains Cooper **Defe**

- -
- -

Lord Marks QC and Mr Luke Wygas (instructed by Clarke Willmott LLP) for the **Claimant**

Mr Sean Brannigan QC and Mr Thomas Crangle (instructed by Triton Global Ltd (trading as Robin Simon) for the **Defendant**

Hearing dates: 2 February 2016 (Further submissions 7 February 2016)

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JUDGMENT

Edwards-Stuart J:

Introduction

1.
This is the second judgment in this case. In the first judgment I held that the claim by Lloyds Bank plc ("the Bank") against its project monitor, McBains Cooper, succeeded. McBains Cooper was retained to advise the Bank in connection with a loan made by the Bank for the development between 2007 and 2009 of a building in Church Road, Willesden, that was used as a church.

2.
In order to put this judgment in its context I shall repeat or summarise the opening paragraphs of the first judgment.

3.
The borrower was the exotically named Miracles Signs & Wonders Ltd ("the borrower"), a special purpose vehicle formed by a trust, the Miracle Signs & Wonders Ministry Trust ("the Trust"). Its pastor was a Mr James Chukwu.

4.
The Bank agreed to lend the borrower £2.625 million to assist with the development on the terms of a Facility Letter dated 30 May 2007. Over a year before that the Bank had retained McBains Cooper to act as the project monitor. The role of a project monitor is to check the progress and quality of the works and to approve the applications for drawdown submitted on behalf of the borrower and to make recommendations to the Bank as to the amount that should be paid against the drawdown request. Some witnesses described the project monitor as the Bank's eyes and ears in relation to the project.

5.
Unfortunately, it all went wrong. After about 21 months the Bank's facility was virtually exhausted and the development was far from complete. It appeared that neither Mr and Mrs Chukwu nor the congregation had sufficient funds to meet the balance of the costs of completing the development, which were thought to be in excess of £700,000. In those circumstances the Bank decided to cut its losses and realise its security in the form of a charge over the development property and two properties owned by Mr and Mrs Chukwu.

6.
As I noted in the principal judgment, the claim has a somewhat chequered history. Although the Bank realised in mid March 2009 that things had gone badly wrong, the claim form was not issued until July 2013, at a time when the dispute was the subject of an adjudication. Particulars of Claim were not served until 4 April 2014.

7.
The Bank claimed about £1.4 million, being the total amount of the sums advanced under the facility less the recoveries made from the sale of the various properties over which the bank had a charge. This sum takes into account the sums recovered following the adjudication.

8.
It was not until closing submissions at the end of the trial that each side accepted that it had fallen below the standard that was reasonably to be expected of it. It is now quite clear that this loan should never have been made by the Bank in the first place (a decision for which it cannot blame McBains Cooper) and that during the course of the work McBains Cooper gave advice that was unquestionably negligent.

9.
The issues determined at the trial were ones of reliance and causation: to what extent did the Bank rely on the advice given by McBains Cooper and who was actually responsible for the loss sustained by the Bank?

10.
I concluded that McBains Cooper was liable for the sums advanced by the Bank which would not have been advanced if McBains Cooper had not been negligent. However, I held also that the Bank was one third to blame for that loss.

11.
Unfortunately, on the material available at the trial I could not arrive at a precise figure by way of damages, but on 27 October 2015 I circulated some tentative conclusions entitled "Provisional indication as to damages". In addition, the Bank wished to call the valuation experts to provide a valuation at a date that I had determined in the judgment and mentioned in the provisional indication. For various reasons, it was not possible to do this until 2 February 2016.

12.
The Bank was represented by Lord Marks QC and Mr Luke Wygas, instructed by Clarke Willmott LLP, and McBains Cooper was represented by Mr Sean Brannigan QC and Mr Thomas Crangle (for the damages hearing only), instructed by Triton Global Ltd (trading as Robin Simon).

The background and summary of the claim

13.
During the course of the project McBains Cooper issued 19 Progress Reports. Progress Report 10 contained the first reference to the expenditure of money which in fact related to works to the third floor of the building, which the borrower had decided to carry out without having obtained the agreement of the Bank. Accordingly, this work was outside the scope of the facility. However, McBains Cooper had indicated in earlier reports that the borrower was intending to carry out this work. Progress Report 10 included a sum of about £10,000 in respect of additional piles required to support the extension to the third floor.

14.
In the principal judgment I found that the Bank would not have agreed to pay the £10,000 in respect of the piles for the third floor, but the money would have been found by the borrower. I found also that by the end of October 2008 the Bank should have been advised by McBains Cooper of the likely costs to complete the development, and that this would have shown that there was a likely shortfall in the available funds of at least £325,000.

15.
I concluded that if, in November 2008, the Bank had taken external advice about the amount of the costs to complete and the likely value of the development if completed, it would have been advised that the option of completing the development was risky. In the light of this, I found that the Bank would have decided to terminate the facility at the end of 2008 and demand repayment. Since repayment of the amount outstanding under the facility would not have been forthcoming, it would have sold the building in its then condition. I found that, if the Bank had moved reasonably swiftly after it became apparent that the borrower had no money, it could have put the property on the market in the spring of 2009.

16.
It was in the light of these findings, that it became necessary to have valuation evidence as to the market value of the building at that date.

The evidence of the valuation experts

17.
The Bank’s valuation expert was a Mr Peter Rawlinson, of Aitchison Rafferty, who valued the property as at April 2009, but in its condition in December 2008. He considered it to be worth “around £1.2 million”.

18.
The residual valuation from which this figure was derived was, rather surprisingly, not appended to his report, but it was produced after those advising McBains Cooper had called for it. The actual valuation was in the sum of £1,156,307, which Mr Rawlinson rounded up to £1.2 million. In cross-examination Mr Rawlinson conceded that his valuation would have to be adjusted downwards by about £450,000 if the appropriate figure for the construction costs was £2.86 million, and not £2.557

million, which was the figure used in the valuation. [1] This took into account not only the increase in construction costs, but consequential revisions to reflect changes in the allowances for contingencies and finance costs. A further factor to be taken into account was the fact that the building was not wind and weather tight in mid December 2008.

19.
I consider that the concession extracted from Mr Rawlinson during cross-examination in relation to the allowance for contingencies probably went further than the facts warranted, nevertheless I consider that his valuation - if it was the right approach - was probably too high by about £300,000 - £350,000.

20.
The expert instructed on behalf of McBains Cooper was Mr Richard Alford, of Copping Joyce. He had been put in a difficult position because he had been asked to produce his first report at extremely short notice - a matter of about 5 days - in order to replace the previous expert who could no longer act having had a heart attack. In effect, he largely adopted the views of his predecessor without having had a proper opportunity to study all the available material. His report prepared for the purpose of this hearing, many months later, took a very different line. He no longer considered that a residual valuation was an appropriate approach for this particular case: he said that it would produce a site value of about £2 million as at September 2010, which was completely inconsistent with the accepted offer of £1 million.

21.
His approach, therefore, was to consider various property indices and work back from the September 2010 price of £1 million. Put shortly, he considered the London Residential Development Land Value Index produced by Savills, which showed a 42% increase in values between March 2009 and September 2010, and, in addition, the Land Registry House Prices Index, which showed an increase of about 10% over the same period. He then added these two figures together, halved the total and thereby arrived at a mean of 26%.

22.
At this point his arithmetic went badly wrong. In order to produce his starting valuation he took the relevant percentage, 26%, of the £1 million sale price, and subtracted it from the sale price to produce a figure of £740,000. From that figure he deducted the cost of repairing the roof of the building, which had been previously assessed at £146,907, to produce a valuation of £594,073, rounded up to £600,000. Of course, what he should have done is to divide £1 million by 1.26, which would have produced a figure of £793,000, not £740,000. So, on any view, that valuation was £50,000 too low.

23.
This was, to say the least, an unfortunate piece of work. In addition, his derivation of the 26% was in my view highly suspect. The other difficulty is that the cost of repairing the roof is not one that would have been known to a potential purchaser: it was a figure derived from cost reports produced in the course of the project.

24.
I have to say that this evidence was pretty unsatisfactory on both sides. However, that was not entirely the fault of the experts. They were being required to value a property as at date Y, but in its condition as at date X. This is both an artificial and a difficult exercise and I am not surprised that both experts found it so.

25.
The whole problem was compounded by the fact that the required valuation date, namely April 2009, was only a few months after the financial crash at the end of 2008. Mr Alford described the market conditions as “dire with virtually no development finance available”. I accept that description.

26.
In these circumstances I do not consider that the evidence of either expert is susceptible to any more detailed analysis: this is a case for the use of a broad brush. Doing the best I can, I consider that the likely improvement in the value of properties such as this one between April 2009 and September 2010 was far lower than the 26% taken by Mr Alford, and was probably no more than 10%. In addition, I accept that some allowance had to be made for the condition of the property, and I consider that a typical purchaser would probably allow at least £100,000 for this possibly £150,000. If Mr Alford’s valuation was adjusted to reflect these figures, the result would have been a valuation of somewhere between £750,000 and £810,000.

27.
As I have indicated, I consider that Mr Rawlinson’s residual valuation was based on a construction cost that was too low and that, if adjusted by the margin that I have mentioned, it would have been between about £805,000 and £855,000.

28.
I therefore conclude that the correct valuation in April 2009 was probably about £800,000.

The monthly drawdowns

29.
It is relevant to recall how Mr Symons described the role of a project monitor in relation to the monthly drawdowns: in his e-mail of 24 September 2007 to Mr Humphrey, he said

“That said, the process of drawdown would normally be as follows:

•
Copy of valuation of works and certificate sent to McBains Cooper for approval,

•
McBains Cooper visit to site and meet with team to assess progress et cetera.

•
Borrower forwards “Drawdown Request Letter” to Bank, copied to McBains Cooper detailing the amount of funds requested, a breakdown thereof including VAT elements and enclosing copies of backup invoices.

•
McBains Cooper issue a report to Bank detailing Costs, Progress and Authorising Drawdown if appropriate.

It may be easier for us to have a conversation about this, if you wish.”

30.
In the light of the terms of the retainer, which I have set out in paragraph 21 of the principal judgment, I consider that McBains Cooper’s duty at the time of preparing each progress report was,

amongst other things, to carry out the following tasks and to exercise all reasonable care and skill when doing so:

(1)
To check the drawdown request so as to ensure that all constituent costs were justified and were in accordance with the facility.

(2)
To check that the work to the value - at least, approximately - for which payment was being requested had been carried out.

(3)
To comment on the progress of the development, with particular reference to any matters adverse to the Bank's position, such as delay or variations to the work, and their implications in relation to the completion of the development and its timing.

(4)
To review actual expenditure against the cash flow statement and to confirm that the undrawn balance of the facility was sufficient to meet all the costs of achieving practical completion.

31.
In evidence, Mr Ric Diana, the Bank's Director in Global non-core, said this (at Day 6/30-31):

"And the other question potentially is around should we have lent to a religious institution, bearing in mind the highly - the high reputation risk in relation to religious institutions, but also in relation to the PR impact, should we have actually had to pull the plug on this."

32.
In these circumstances, it seems to me reasonably clear that the Bank would have thought long and hard before terminating a loan in circumstances where the borrower was not to blame for the state of affairs that had arisen. In my view, that would have been the position if, at the time when the first application was made for a drawdown which included the cost of works to the third floor, the matter had been reported immediately to the Bank by McBains Cooper. As I indicated in the principal judgment, I cannot see how the Bank could legitimately attach any great blame to the borrower personally for an application made on its behalf by Clark Associates who may well have been unaware of the terms or limitations of the facility. Further, as Mr Diana indicated and I accept, the adverse consequences in terms of public relations of the Bank effectively closing down a church were not to be underestimated.

33.
I consider that a project monitor in McBains Cooper's position would reasonably be expected to assume that, having committed itself to grant a particular loan to a borrower for a specified purpose, particularly a religious one, the Bank would be obliged, if not contractually at least as a matter of business ethics, to honour the terms of the facility unless the borrower gave the Bank cause to terminate it. McBains Cooper could not, in my judgment, expect the Bank to terminate a facility - assuming that the borrower was performing and continuing to perform its obligations - simply because the facility may have become commercially unattractive for reasons beyond the control of either the Bank or the borrower.

34.

It follows from this that, at the time of each drawdown, unless informed of something out of the ordinary, the Bank was not expected by McBains Cooper to take (and would not take) a decision as to whether or not it was commercially appropriate to permit the borrower to drawdown the amount recommended by McBains Cooper in its monthly progress report. The commercial reality was that the Bank would honour any request for a draw down that was said to be in accordance with its facility and in relation to which McBains Cooper had given the required confirmation about the adequacy of the facility to meet the balance of the development costs.

35.
So if McBains Cooper made a recommendation in accordance with the terms of its retainer as to the amount that could properly be drawn down, the Bank would be expected to advance the sum recommended by McBains Cooper without further investigation or question. Mr Brannigan was insistent in his submissions that this was an “information” case, as opposed to an “advice” case. [2] I do not consider that to be entirely correct. For the reasons that I have given, when it submitted each monthly Progress Report McBains Cooper was effectively advising Bank to pay the sum stated in the report. It may well be that different considerations apply to the initial report that McBains Cooper gave to the Bank, but for present purposes that is irrelevant.

36.
Accordingly, in relation to the borrower’s monthly applications for drawdown against the facility I consider that it was McBains Cooper’s duty to protect the Bank from paying sums which, if properly advised, it would not have paid. Putting it another way, when submitting its monthly progress report to the Bank it was McBains Cooper’s duty to warn the Bank if the development was not going according to plan; for example, either because the works were in delay, or because significant variations had been ordered by the borrower which went outside the scope of the project as contemplated when the facility was granted.

37.
In the context of this case, it seems to me that a crucial aspect of this was that if McBains Cooper’s progress reports were properly and carefully prepared, the Bank would be in a position to take timely action to limit its exposure in the event that the project fell into delay, or there were unexpected variations to the scope of the work or there was some other complication affecting either the likely cost to complete or the anticipated date of completion. To provide such reports is the purpose for which a project monitor is there.

38.
So in my judgment losses against which McBains Cooper was under a duty to protect the Bank included (a) advancing money under the facility to which the borrower was not entitled or (b) advancing money in circumstances in which, if properly informed, the Bank would have decided not to do so and would have terminated the facility. However, McBains Cooper cannot of course be liable for losses that would still have occurred if it had properly performed its duties.

39.
In a post hearing submission dated 7 February 2016, Mr Brannigan accepted that the duties owed by McBains Cooper included duties to advise the Bank:

(1)
if the borrower was proposing to drawdown, or is actually drawing down, money from the facility in respect of work to the third floor; and

(2)
as to whether there was or is not enough money in the facility to complete the development.

40.
It seems to me that the latter must include a duty to consider, at the time of preparing each monthly Progress Report, the likely cost to complete the development: if the project monitor does not know the full extent of the funds available, then he should at least provide an estimate of the cost complete with the monthly Progress Report.

The findings and conclusions in the principal judgment

41.
The principal judgment included the following paragraphs:

“3. The role of a project monitor is to check the progress and quality of the works and to approve the applications for drawdown submitted on behalf of the borrower and to make recommendations to the Bank as to the amount that should be paid against the drawdown request. Some witnesses described the project monitor as the Bank’s eyes and ears in relation to the project.

7. . . . It is now quite clear that this loan should never have been made by the Bank in the first place (a decision for which it cannot blame McBains Cooper) and that during the course of the work McBains Cooper gave advice that was unquestionably negligent.

73. . . .

(iv) McBains Cooper should have advised the Bank of any significant variations to the building contract, or to any circumstances that were likely to result in a significant variation for which the borrower (and hence the Bank under the facility) would be liable.

(v) McBains Cooper should have advised the Bank as soon as the borrower included costs of works to the third floor in any application for drawdown under the facility.

147. The Bank’s real case is (a) that it was misled by inaccurate statements in the Progress Reports confirming the adequacy of the facility to meet the costs of the development, and (b) the failure by Mr Symons to notify the Bank, from PM No 9 onwards, that sums were being included in the applications for drawdown that had been spent on the work to the third floor. As a result, says the Bank, it continued to advance money under the facility in circumstances where, if properly advised, it would not have done.

222. I would have thought that it goes without saying that it was contrary to the Bank’s interests to pay for work that fell outside the scope of its facility. It was therefore the duty of Mr Symons to take reasonable care to ensure that this did not happen. I think that one can reach this conclusion as a natural incident of the relationship of project monitor and bank, but if it has to be based on a breach of an identified obligation in the retainer, then it seems to me that it falls within paragraph 3.1.2.

243. However, when the borrower applies to the Bank to drawdown money under the facility, his application should be limited to the work that was in the scope of the facility. It is therefore an important part of a project monitor’s role to check the application so as to ensure that it is confined to expenditure falling within the scope of the facility. Thus it was the duty of Mr Symons to check every application carefully. If he was of the opinion that sums had been included in the monthly valuation for work that was, or might have been, outside the scope of the work covered by the facility, it was his

duty to advise the Bank accordingly and not to recommend that those sums be included in the monthly drawdown.

263. In these circumstances I consider that it is likely that work on site would have continued, save for work related to the third floor. This is because I consider that the Bank would not have wished to jeopardise the option of completing the development by stopping the work prematurely. PR No 12 would have been issued around mid October and this would have brought the total drawdown up to £1,226,231 (ie. £1,408,582 actually claimed less sums in respect of the third floor works, namely £10,000 + £10,156 + £162,195). By the end of October 2008 I would have expected Mr Clark to have produced a schedule of costs to complete. I find that this would not have been very different to the one that he produced as at 31 December 2008.

264. So, by the end of October 2008, two things would have become apparent. First, Mr Symons would have assessed the amount of the likely costs to complete the original project (ie. without the third floor works) and this would have shown that the likely shortfall in the funds required was at least £325,000, if professional fees are taken into account. Second, Mr Clark would have carried out a similar exercise. If he had done this, I consider that his figures would have showed costs to complete of about £3.4 million, of which about £550,000 would have been attributable to the third floor (in assessing these figures I have added back the £182,350 that, on this scenario, would not have been paid for the third floor but which, by then, had been paid).

265. Put very broadly, I consider that the costs to complete (excluding the third floor) would have been assessed by Mr Symons and Mr Clark at between about £300,000 and £400,000.

277. For the reasons that I have now given if McBains Cooper had properly performed its obligations under the Retainer, the Bank would have become aware of the true financial position in November 2008. It would have taken the decision to terminate the facility and call on the security. I find that this decision would probably have been taken in December 2008 if McBains Cooper had informed the Bank, as it should have done, in August 2008 that the borrower was seeking to drawdown £10,000 for the cost of piling work in relation to the third floor. On this basis, if the Bank had moved reasonably swiftly after it became apparent that Mr Chukwu had no money, I find that it could have put the property on the market in the spring of 2009.

278. Since McBains Cooper did not advise the Bank, either then or at any time prior to the end of December 2008, that (a) that the borrower was proposing to drawdown, or was actually drawing down, money from the facility in respect of work to the third floor and (b) there was not enough money in the facility to complete the development, it is in principle liable for the losses sustained by the Bank after the end of November 2008. That is because I find that the Bank would not have permitted any further drawdowns on the facility thereafter.

284. In assessing any apportionment of liability to the Bank for its contributory negligence I must have regard to both the blameworthiness and the causative potency of its actions. In my view, the lion’s share of responsibility for what went wrong after August 2008 must rest with McBains Cooper. As Mr Symons rightly accepted, it was engaged to advise the Bank as to the amounts that should be drawn down under the facility and to take reasonable care to protect the Bank from the loss it would suffer as a result of paying too much.”

The loss

42.

The conclusions that I reached in paragraphs 277 and 278 of the principal judgment do not in my view require any reconsideration in the light of the further submissions that have been made. It was the duty of McBains Cooper to protect the position of the Bank when submitting its monthly Progress Reports in the way that I have described. It failed to do so in the latter part of 2008, in particular as described in paragraphs 249 to 265 of the principal judgment.

43.
Mr Brannigan correctly reminded the court that a project manager cannot be liable for any loss which would have "arisen even if the advice had been correct". In this case if the advice given in the monthly Progress Reports in the latter part of 2008 had been correct, I have concluded that the Bank would have declined to advance any further money under the facility after November 2008. By doing so in reliance on the information provided by McBains Cooper it sustained a loss. The loss was the money that it advanced from December 2008 onwards, less any amount by which that element of its overall losses was diminished following the realisation of the security. [3]

44.
In these circumstances I consider that McBains Cooper is in principle liable to the Bank for the sums which, on the basis of the Progress Reports submitted by McBains Cooper, the Bank paid out from Progress Report 14 onwards, together with the sums that the Bank paid in respect of the third floor works that were included in Progress Reports 10-12, namely £198,851. That I find is a total of £815,770.93, which I derive from the figures put forward by the Bank.

45.
In my judgment these sums are within the scope of the duty owed by McBains Cooper because if the Bank had been correctly informed as to the true position, none of these sums would have been paid out. Accordingly, these payments fall within the "SAAMCO cap": see South Australia Asset Management Corporation v York Montague [1997] AC 191. I reject the submission made by McBains Cooper that the only payments falling within the "cap" are those in respect of the third floor works. I have considered the authorities to which I was referred, in particular the SAAMCO decision itself, but I do not find that they provide any real guidance on the facts of this case.

46.
I consider that these advances under the facility constituted a loss to the Bank when they were wrongly paid: whether or not the Bank would be able to mitigate that loss by realising the security is, in my view, a wholly separate question which goes to the amount of the recoverable damages rather than to the scope of the duty.

47.
However, one consequence of what actually happened is that when the property was sold the net proceeds, £832,611, were more than the net proceeds would have been - on my finding as to the value at the relevant time - if the property had been sold in April 2009. If the sale price had been £800,000, which I consider was its market value at the time, the net proceeds would have been £640,000.

48.
Accordingly, I consider that the difference between these two figures, £192,611, should be set off against the loss, producing a net recoverable amount for which McBains Cooper is potentially liable, before taking into account contributory negligence, of £622,159.93. Since I have held that the Bank was one third to blame for the loss, the liability becomes £415,439.95.

49.

However, McBains Cooper has already paid £288,304 following the adjudication, leaving a balance of £127,115.95. That sum does not include interest on that sum, which I consider should run from 1 January 2009 at the annual rate of 1.75%. I will leave the parties to calculate the precise sum due in respect of interest.

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[1] In his first report Mr Rawlinson said that “taking the position as at 1 March 2009 and with the building completed to the state as at 18 April 2008, I consider that a prospective purchaser would have anticipated an additional spend of a sum of £3,000,000 including costs and allowance for risk and profit” (paragraph 12.8). This, of course, was not the date at which the building’s condition was to be valued, but the figure of £2.86 million put to Mr Rawlinson in cross examination was not explored in re-examination.

[2] In this context, it is perhaps slightly ironic that at paragraph 59(g) of the Amended Defence McBains Cooper pleads that the Bank "failed to have any or any adequate regard **to the advice provided by McBains Cooper** throughout the course of the project (whether orally, by e-mail and/or within the various reports . . .)" - my emphasis.

[3] It may be that any recovery from the realisation of the security would be applied to other losses first: it will depend on the circumstances.