Neutral Citation Number: [2016] EWHC 2764 (TCC)

Case No: HT-2015-000195

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 3 November 2016

Before:

THE HON. MR JUSTICE COULSON

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Between:

THE COUNCIL OF THE BOROUGH OF MILTON KEYNES **Cla**

- and -

VIRIDOR (COMMUNITY RECYCLING MK) LIMITED **Defe**

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Robert Clay (instructed by **Anthony Collins Solicitors LLP**) for the **Claimant**

Michael Davie QC (instructed by **Ashfords LLP**) for the **Defendant**

Hearing date: 28 October 2016

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Judgment Approved

Mr Justice Coulson:

1. INTRODUCTION

1.
At the PTR on 28 October 2016, the Defendant made an application to amend its Defence. Although the application to amend covered a variety of topics, the most significant element of that application was an attempt by the Defendant to join a second company, Viridor Waste Management Limited ("VWML") as a Second Defendant. Save for certain short paragraphs of the proposed amended Defence, which are not addressed below, the application to amend was opposed by the Claimant ("the Council").

2.
At the conclusion of the argument, I gave brief oral reasons why I was refusing the Defendant's application to add VWML, but allowing certain other amendments. I told the parties that I would provide fuller written reasons in due course. This then enabled us to complete the PTR aspects of the

hearing in the time allowed. This Judgment sets out the full reasons for my decision on the application to amend.

2. BACKGROUND

3.
By a contract made on or around 1 October 2009, the Council engaged the Defendant to carry out waste disposal and recycling services over a fifteen year period. Thereafter, on the Council's case, they became aware that the compensation provisions in the contract were not those which the parties had intended to incorporate, in particular because they did not allow for inflation indexation. In consequence, the Council now asks the Court to rectify that contract.

4.
The Council's claim was first indicated by letter in March 2012. By then, VWML had purchased all the shares in the Defendant. As a result of the indication of the claim by the Council, VWML notified the sellers of the shares that, if the contract was rectified in the way sought by the Council, they would contend that the sellers were in breach of warranty under the Share Purchase Agreement ("SPA").

5.
The Council sent their letter of claim in accordance with the pre-action protocol in January 2014. That appears to have prompted VWML to issue proceedings for breach of warranty against the sellers. The difficulty with VWML's claim against the sellers was that there was a three-year time limit under the SPA for the bringing of contingent claims, which required the claim to have 'crystallised' within that time. Because the claim for rectification had not been the subject of judicial determination in that three-year period, Senior Master Fontaine ruled ([2016] EWHC 435 (QB)) that the claim against the sellers was out of time. Thus, the reason that VWML now has no redress against the sellers is their own failure to commence proceedings promptly: it is not suggested that the Council was even aware of the time limit or the requirement for 'crystallisation' in the SPA.

6.
The Council issued proceedings against the Defendant, seeking rectification of the contract, on 28 April 2015. The trial is due to take place in January 2017. Although that is longer than cases usually take in the TCC, the parties were unable to explain how that delay had arisen in this case.

3. THE AMENDMENTS INVOLVING VWML

7.
The paragraphs of the amended Defence setting out the position of VWML are paragraphs 0, 0A, 1A, 21-31, and 33. These paragraphs envisage the joinder of VWML as a Second Defendant to these proceedings, and go on to plead on its behalf the defence of a 'Bona Fide Purchaser for Value Without Notice' (the heading immediately before paragraph 22 of the amended defence). There is also a related defence of laches which, apart from paragraph 32 (which I deal with separately below) is solely concerned with the proposed Second Defendant, VWML.

8.
I refused the Defendant permission to join VWML as a defendant and to make the amendments noted above. There are a number of reasons for that.

9.

First, I do not consider that the Court has the power to join a party as a defendant, in circumstances where the claimant opposes that joinder. No authority in support of such a novel proposition was cited to me.

10.
Reference was made to CPR 19.2(2) which provides as follows:

"(2) The court may order a person to be added as a new party if–

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

11.
The proposed joinder of VWML is not caught by either of these provisions. There is no matter in dispute between the Council and VWML; indeed, the Council has made it plain that, because there is no dispute between it and VWML, it does not wish for VWML to be joined into the proceedings as a defendant. Neither is there any pleaded issue between VWML and the Defendant.

12.
Furthermore, I consider that it would be a nonsense if a defendant could join another defendant into the proceedings against the claimant's wishes, in circumstances in which that claimant would then become potentially liable for the costs of the new defendant. A claimant is entitled to bring proceedings against the parties with whom it considers that it has a dispute. A claimant cannot be forced to issue proceedings against any other party. Accordingly, these amendments fail in principle.

13.
If I was wrong about that then, in my judgment, the pleading of the defence of a bona fide purchaser for value without notice is inapplicable in the present case, and doomed to fail. That defence is a particular defence which arises in respect of the sale of land or a legal interest in property (see **Snell's Equity**, 33rd Edition, paragraphs 4-017 onwards). It is an exception to the basic rule of first in time priority of interests.

14.
In the present case, there has been no purchase of a relevant legal title. The interests which are potentially affected by this claim are the Defendant's rights under the contract with the Council. Neither VWML, nor any other party, has acquired legal title to the Defendant's rights under that contract. The Defendant continues to provide the services pursuant to the contract, and is the legal owner of all the service provider's rights under that contract. The acquisition by VWML of the shares in the Defendant company makes no difference to that position. The purchase does not mean that VWML, or anyone else, has obtained the legal title to the rights that exist under the contract with the Council.

15.
The same point can be illustrated by reference to paragraph 16.025 of **Snell**, which is concerned with rectification. The paragraph makes plain that rectification "will not be granted to the prejudice of a bona fide purchaser for value without notice who takes an interest conferred by the instrument". In the present case, VWML have not taken any interest conferred by the contract between the Defendant

and the Council. In those circumstances, the pleaded defence of a bona fide purchaser without notice, does not arise.

16.
Perhaps conscious of this point, during the course of his submissions on behalf of the Defendant, Mr Davie QC put VWML's position rather more broadly. He said that it was wrong to link this potential defence solely to cases involving land or title and that, in any claim for rectification, it was appropriate to look at the rights of all third parties – including VWML – before deciding whether or not the contract should be rectified. He drew my attention to the decision of the Court of Appeal in **Riaz Ahmad v Secret Garden (Cheshire) Limited** [2013] EWCA Civ 1005. At paragraph 32 of her judgment, Arden LJ said:

"Rectification is an equitable remedy. The court may refuse it if it thinks fit to do so. This may be because an innocent third party has acquired rights or because the party seeking rectification has affirmed, that is, accepted that he is bound by, the unrectified agreement knowing that it did not reflect the parties' agreement."

In similar vein, Mr Davie also referred me to passages in chapters 6 and 7 of **Rectification** by David Hodge QC, 2nd Edition, and chapter 6 in Spry's **Equitable Remedies**, 9th Edition.

17.
As a matter of general principle, I respectfully agree with Arden LJ's synopsis of the law of rectification in **Riaz Ahmad**. But that was a case about the acquisition of land. Moreover, the other extracts from the textbooks to which I have referred make plain that any extension of the principle beyond the bona fide purchaser of a legal title remains narrow. In any event, there are a number of insuperable difficulties for the Defendant with the way in which the broader point was developed in oral submissions.

18.
First, that is not how these paragraphs have been pleaded; the proposed amendments to the Defence are put only on the basis of the bona fide purchaser exception. Secondly, even assuming the wider basis had been pleaded, I do not regard VWML as a third party for this purpose. They are simply the owners of the shares in the Defendant. If, as a result of any rectification of the contract, VWML suffers a loss, then that is precisely the same loss as the loss suffered by the Defendant. VWML's interests are not different or distinct from those of the Defendant, so the broad exception does not arise in any event.

19.
It seems to me that this result accords with commercial common sense. It would be a curious result if, once X had acquired the shares in Y some time after the contract between Y and Z had been agreed, that acquisition could then give Y a defence to an otherwise justifiable rectification claim, in circumstances where the acquisition of the shares was nothing to do with the contract, and wholly outside the knowledge or control of Z. For those reasons, even if the Court had the power to join in VWML, I would not allow these amendments because I consider that they raise a hopeless defence.

20.
However, even if my analysis was wrong, there are other, more prosaic reasons why, in all the circumstances, the amendments concerning VWML should not be allowed so close to trial. In my view, it would not be fair or proportionate to permit them.

21.
The first issue concerns timing. These amendments are very late. VWML issued a claim against the sellers for breach of warranty in April 2014, proceedings which only started because of the notification to the Defendant of a claim by the Council for rectification. Thus it must follow that, once the Council issued these proceedings in April 2015, this 'defence' (if that is what it is) could and should have been raised right at the outset. That did not happen, and there is no explanation as to why not, or any attempt to explain why the amendments are only being put forward now.

22.
In **CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited** [2015] EWHC 1345 (TCC), at paragraph 19, I set out the principles which now apply to late applications to amend:

"(a) The lateness by which an amendment is produced is a relative concept (**Hague Plant Ltd v Hague and others** [2014] EWCA Civ 1609). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.

(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (**Swain-Mason and others v Mills and Reeve LLP** [2011] EWCA Civ 14) even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (**Brown v Innovatrone PLC** [2011] EWHC 3221 (Comm)).

(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (**Brown**; **Wani LLP v Royal Bank of Scotland PLC** [2015] EWHC 1181 (Ch)). In essence, there must be a good reason for the delay (**Brown**).

(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (**Swain Mason**; **Hague Plant**; **Wani**).

(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (**Worldwide Corporation Ltd v GPT Ltd and another** [1998] WL 1120764) to the disruption of and additional pressure on their lawyers in the run-up to trial (**Bourke and another v Favre and another** [2015] EWHC 277 (Ch)) and the duplication of cost and effort (**Hague Plant**) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (**Swain Mason**)."

23.
In my view, the amendments concerning VWML fall foul of these principles. If they were allowed, then an extensive disclosure exercise would be required. There would have to be further pleadings. Witness statements would have to be obtained. It would not be possible for all that to be done before the trial in January. In that context I note that, even in respect of the limited amendments which I have allowed, the parties do not feel able to exchange witness statements until early January 2017.

24.

Secondly, I should also say that the Defendant has not helped itself by its parsimonious attitude towards disclosure. When a party makes a late amendment, it is incumbent upon that party to provide as much information as possible relating to the subject matter of the amendment. That would include the disclosure of all relevant documents relating to the amendments. That is particularly so where, as here, only one party – the Defendant – has any knowledge of the events said to give rise to this 'defence'. Until earlier this week, the Defendant had provided almost no documents in respect of this new claim, and even now, much remains unclear and unexplained.

25.
For all those reasons, I have concluded that the joinder of VWML as the Second Defendant and the amendments at paragraphs 0, 0A, 1A, 21-31, and 33 of the Defence, must be refused.

4. PARAGRAPH 33: LACHES

26.
Paragraph 32 of the amended Defence pleads, albeit in fairly outline terms, a defence of laches on behalf of the Defendant (not VWML). There are three reasons why I was persuaded to allow this amendment.

27.
First, it seems to me that this defence is arguable. Although Mr Clay put forward a number of submissions to the effect that laches could not succeed here, relying – amongst other things - on the judgment of Blackburne J in **KPMG LLP v Network Rail Infrastructure Ltd** [2001] EWHC 67 (Ch), these were not matters which I could decide on an application of this kind. In contrast to the issues arising out of the application to join VWML, they were quintessentially matters for the trial.

28.
Secondly, in any claim for an equitable remedy (such as rectification), delay is something which the Court is bound to consider, whether or not it has been expressly pleaded: see the decision of the Court of Appeal in **Riaz Ahmed**. So this amendment raises something which the court would have always had to consider anyway.

29.
Thirdly, Mr Clay properly accepted that, if the amendment were allowed, the Council could deal with it in time for the trial. It is a self-contained issue and if it requires any further disclosure or short witness statements, then those steps can easily be accommodated in the remaining time prior to trial. Indeed, I suspect that any further evidential material on this aspect of the case will be very limited.

30.
For all those reasons, I have concluded that the amended paragraph 32 should be allowed.

5. PARAGRAPHS 13, 13A, 14 AND 34: OPERATION IN PRACTICE/ ACQUIESCENCE

31.
These paragraphs concern various events which occurred after the contract was signed. On behalf of the Defendant, Mr Davie QC submits that they go to two matters which are in issue: first, whether or not there was a mutual mistake, and secondly, whether or not the events demonstrate acquiescence on the part of the Council to the operation of the contract without indexation for inflation.

32.

In my view, there are a number of reasons why these amendments should be allowed. First, I consider that they properly respond, at least in part, to allegations of fact in the Particulars of Claim. Secondly, they go to the states of mind of both the Council and the Defendant in the months after the contract was signed, and are therefore potentially relevant to questions of mutual mistake. Thirdly, it is often the case that disputes about the meaning of contracts concerned with the provision of services over a lengthy period may involve a consideration of the operation of the contract in practice: see, for example, **Connect Plus (M25) Ltd v Highways England Company** [2016] EWHC 2614 (TCC).

33.
In addition, again in contrast to the amendments involving VWML, I do not consider that the matters raised in these amendments will be particularly difficult or onerous for the parties to deal with in advance of the trial. It is unlikely to make any difference to disclosure. If further witness statements are required, then I regard these matters as self-contained and of relatively narrow compass. I am entirely confident that they will cause little, if any, disruption to the preparations for trial.

34.
Accordingly, I allow the amendments to paragraphs 13, 13A, 14 and 34, although the references to ‘the Second Defendant’ will obviously have to be changed.