Neutral Citation Number: [2021] EWHC 1921 (TCC)

Case No: HT-2020-000345

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 09/07/2021

Before :

MRS JUSTICE JEFFORD DBE

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Between :

(1) AVIVA INVESTORS GROUND RENT GROUP GP LIMITED
(2) AVIVA INVESTORS GROUND RENT HOLDCO LIMITED — **Claimants**

- and –

SHEPHERD CONSTRUCTION LIMITED — **Defendant**

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Paul Fisher (instructed by **Pinsent Masons LLP**) for the **Claimants**
James Leabeater QC (instructed by **Fieldfisher LLP**) for the **Defendant**

Hearing date: 10 May 2021

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Approved Judgment

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Approved Judgment

MRS JUSTICE JEFFORD:

Background

1. This action arises out of a contract made on or about 6 July 2007 between Camstead Limited ("Camstead"), as the Employer, and Shepherd Construction Limited ("Shepherd"), as Contractor, for the demolition of an existing building and the construction of a new building as self-contained student apartments in Purbeck Road, Cambridge.

2. The contract was made on a standard form JCT Design and Build contract 2005 edition with bespoke amendments ("the Contract"). The Contract provided for sectional completion in 5 sections. The contract was made under seal and the limitation period for claims in contract was, therefore, 12 years.

3. The sections were completed as follows: section 1 on 8 September 2008; section 2 on 19 September 2008; section 3 on 20 October 2009; section 4 on 3 November 2008; and section 5 on 2 April 2009. I was told in the course of the hearing that there was a possible argument that the entirety of the Works had been subsumed within sections 1 and 2 and that the claimants' application was made on the basis that there was potentially a limitation defence in respect of defects in the whole of the works.

4. It is not in dispute that the freehold interest in the property has been conveyed twice. It was conveyed by Camstead on 20 November 2009 to companies called RMB GP Ltd. and RMB GP (Nominee) Ltd.. Those companies later changed their name and the companies both had the name "Hotbed" in their title. In the evidence of Mr Brooksbank, the claimants' solicitor, he refers to four Hotbed companies as owners. Nonetheless, his evidence is, and there is no dispute that, the claimants acquired the freehold interest from the relevant Hotbed companies on 16 April 2012. For the purposes of this judgment, I draw no distinction between the first and second claimants and refer to them collectively as "Aviva".

5. Following the Grenfell Tower fire in 2017 and updated government guidance in January 2020 relating to fire risk assessment of buildings under 18m, Aviva commenced investigations into the cladding and any fire risks in the building. A number of surveys and reports were commissioned and these identified defects (which are set out in the Particulars of Claim) relating to fire safety, including issues with cladding and compartmentation, and non-fire safety matters.

6. Proceedings were commenced on 24 September 2020.

7. On the same date, a Deed of Assignment ("the Deed") was executed between Aviva and Camstead. I set this out more fully below but, amongst other things, it purported to assign to Aviva the full benefit of the Contract and the right to bring proceedings.

8. The Particulars of Claim were served on 19 January 2021. As I have indicated, the Particulars of Claim set out the alleged defects and averred that they arose from breaches by Shepherd of its contractual obligations and warranties. The same matters were also said to amount to the breach of a common law duty of care. Aviva advanced claims for damages being the cost of remedial works and amounting to a little over £4 million. Aviva also pleaded that, if in any way the claim was limited to one for specific

performance, they sought specific performance of each term of the Contract that they alleged had been breached.

The applications

9. There were two applications before me. The first in time, issued on 5 January 2021, is an application by Aviva to join Camstead as a claimant, Camstead having confirmed, by its solicitors, its consent to be joined. The application is expressly made under CPR Part 19.5(2) which applies after the end of the limitation period.

10. CPR Part 19.5 provides

> "(2) The court may add or substitute a party only if –
> (a) the relevant limitation period was current when the proceedings were started; and
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or ……"

11. Camstead relies on sub-paragraph (b) on the basis that the Deed effected an equitable assignment and that the addition of the assignor as a claimant is, therefore, necessary. As a general matter, the explanation for that necessity lies in the risk of exposure of a defendant to claims by or liability to both the assignor and the assignee in the event of an equitable rather than legal assignment. The application is, therefore, predicated on there having been a valid equitable assignment. Aviva rely on clause 7.2 of the Contract, set out below, pursuant to which Aviva say the Deed was made. Aviva do not seek the substitution of Camstead as claimant. Mr Fisher characterised the addition of Camstead as a procedural formality.

12. Shepherd's application, issued on 10 February 2021, is to strike out the claim under CPR Part 3.4(2) on the basis that the Claim Form and Particulars of Claim disclose no reasonable grounds for the claimants bringing the claim. In essence, Shepherd contends that there was no valid assignment and there is no basis to join Camstead under Part 19.5. If necessary, Shepherd goes further and submits that the application to join Camstead can only be made in accordance with CPR Part 19.5(3)(a); that it arises from a mistake as to the identity, rather than name, of the party with any arguable claim; and that the application ought not to be allowed.

Contract terms

13. The argument turns on the terms of the Contract and the Deed. The Contract as amended contains the following terms:

    (i) Clause 7.1.1

    The Employer shall be entitled upon giving the Contractor 14 days' written notice of its intention to do so, to assign the benefit of this contract by absolute assignment

to any person (save any to whom the Contractor makes reasonable objection in writing before the expiry of the said period of 14 days) and in this contract the term "Employer" shall be construed accordingly.

(ii) Clause 7.1.2

The Employer shall be entitled to charge and/or assign by way of security the benefit of this contract to any Mortgagee or HSBC Bank plc without the Contractor's consent.

(iii) Clause 7.2

Where clause 7.2 is stated in the Contract Particulars to apply then in the event of transfer by the Employer of his freehold or leasehold interest in or of a grant by the Employer of a leasehold interest in the whole of the premises comprising the Works or (if the Contract Particulars so state) any Section, the Employer may at any time after practical completion of the works or of the relevant Section grant or assign to any such transferee or lessee the right to bring proceedings in the name of the Employer (whether by arbitration or litigation whichever applies under this Contract) to enforce any of the terms of this Contract made for the benefit of the Employer ....." (emphasis added)

14. Clause 7.2 was unamended from the standard form. The unamended version of clause 7.1 in the standard form provides that, subject to clause 7.2, neither the Employer nor the Contractor shall without the written consent of the other assign the contract or any rights thereunder.

15. The Deed contained the following provisions:

(i) Camstead was defined as the Assignor and the claimant Aviva companies as the Assignee. The Recitals referred to the development of the property, known as Purbeck House, by the Assignor, and recited that the Assignor agreed to assign to the Assignee the benefit of the deeds, contracts and other instruments specified in the Schedule (defined as "the Contracts"). The Schedule listed the Contract between Camstead and Shepherd together with the consultants' appointments and various collateral warranties.

(ii) Clause 1: Assignment of Contracts

The Assignor hereby assigns to the Assignee absolutely:-

1.1 the full benefit of the Contracts and each of them

1.2 the full right of the assignor to require the performance of each Contract by the other party or parties to it to the extent that the same remain to be so performed;

1.3 the full right to enforce any of the terms of the Contracts and each of them;

1.4 the right to bring proceedings (whether by arbitration or litigation as applicable) whether in the name of the Assignor or otherwise; and

1.5 all rights of action of the Assignor under and arising out of the Contracts, whether accrued or accruing in the future and whether arising in contract or in tort or for breach of statutory duty or otherwise."

Clause 7.1.1

16. For Aviva, Mr Fisher submitted that, by comparison with the standard form, both clauses 7.1.1 and 7.1.2 were generous to the Employer and indicative of an intention that the clauses should operate for the benefit of Camstead. Although expressed in terms of permitting assignment, clause 7.1.1 imposes a restriction on the right of the Employer to assign the benefit of the Contract in the sense that it requires the Employer to give notice to the Contractor and, in effect, seek the consent of the Contractor. That is, however, itself a limited restriction or prohibition: if the Employer gives notice, the Contractor may object but that objection must be a reasonable one. I shall refer in this judgment to the position where the Contractor takes no objection, or takes only an unreasonable objection, as the Contractor giving implied consent. The Contract makes no specific provision for the resolution of a dispute as to the reasonableness of an objection but an assignment made in the face of an unreasonable objection would nonetheless be a valid one. Beyond that, the clause places no limitation on the Employer's ability to assign the benefit of the Contract whether in terms of the scope of what is assigned or to whom.

17. The Deed contained no express provision stating whether the assignment was made in accordance with clause 7.1 or clause 7.2 of the Contract. Given the breadth of the assignment, including the full benefit of the Contract, one might be forgiven for thinking that the Deed was intended to be made in accordance with clause 7.1.1. No distinction was drawn in the Deed between what was to be assigned in respect of the Contract and the other appointments and collateral warranties set out in the Schedule.

18. It is, however, common ground between the parties that notice was not given to Shepherd and the consent of Shepherd was not sought. It follows that any purported assignment under clause 7.1.1 was invalid. That follows the decision of the House of Lords in *Linden Gardens Trust v St Martins* [1994] 1 AC 85. Mr Leabeater QC drew my attention to the subsequent case of *Hendry v Chartsearch* [1998] CLC 1382 which is authority for the proposition that it is no answer to this point to say that, if consent had been sought, it would have been given or, alternatively, unreasonably withheld. If notice is not given and consent not sought, the assignment is invalid. There is no dispute between the parties about that.

Clause 7.2

19. In this case, in the evidence in support of Aviva's application, and in opposition to Shepherd's application, Aviva have pinned their colours to the mast of an assignment under clause 7.2.

20. In his submissions, Mr Fisher reminded me of the now leading authorities on contractual construction: *Investors Compensation Scheme v West Bromwich Building Society* [1998] WLR 896; *Chartbrook v Persimmon* [2009] UKHL 38; *Rainy Sky v Kookmin Bank* [2011] UKSC 50; and *Arnold v Britton* [2015] UKSC 36. He placed particular reliance on the proposition that where the language of the contract is capable of more than one meaning, the court should consider the implications of the rival constructions and prefer the construction that is consistent with business common sense.

21. Mr Leabeater QC, however, submits that there is nothing obscure in clause 7.2 and that, so far as material to the present case, it provides:

    (i) only for an assignment without consent by the Employer to a party to whom the Employer assigns and
    (ii) only for an assignment of the right to bring proceedings in the name of the Employer (and thus for the Employer's losses and not those of the assignee).

The direct transferee point

22. So far as the first of these points is concerned, in my judgment, Mr Leabeater's submission is right. The clause is expressly concerned with the transfer by the Employer of a freehold or leasehold interest or the grant of a leasehold interest. There is no wording that would encompass a subsequent transfer by that transferee to another. Further the clause provides for an assignment of the right to bring proceedings to "any such transferee or lessee". The words "any such" plainly refer to the person to whom an interest has been transferred or granted by the Employer. In short, there seems to me nothing in this wording which is capable of referring to a subsequent transfer or grant by someone other the Employer to some other transferee or lessee.

23. Mr Fisher argues there is no reference to, for example, "the transferee" or "the direct transferee", and that the words "any such transferee" are broad enough to include a subsequent transferee. That argument decouples the references to the transfer by the Employer and the transferee. In other words, it is argued that once there has been a transfer by the Employer of, in this case, the freehold interest, the Employer may transfer the right to bring proceedings to any future transferee – including a party to whom the freehold interest is transferred by the Employer's transferee or any subsequent transferee. That is not what the clause says and it gives no effect to the words "any such".

24. Assuming, contrary to my view, that the clause is capable of being read in that way, Aviva contends that it is capable of more than one meaning and should be given its preferred meaning because that is the meaning that is consistent with commercial or business common sense. That argument is self-fulfilling. It assumes that commercial common sense militates in favour of a clause which permits the Employer to transfer to any future freehold owner the right to bring proceedings in the Employer's name without the consent of the Contractor. That argument is premised on the "generosity" of clause 7.1.1. But if clause 7.2 is read in the light of clause 7.1.1 (and particularly if the right to bring proceedings extends to proceedings for the future freehold owner's loss), there is no reason why that construction meets the needs of commercial common sense. Clause 7.1.1 places a significant, if limited, restriction on the ability of the Employer to assign the benefit of the Contract by requiring notice to the Contractor and the absence of a reasonable objection. Clause 7.2 itself provides an exception to the requirement for notice and implied consent of the Contractor. It makes commercial sense for that exception to be construed in a limited way. It does not make commercial sense for clause 7.2 to be given a construction which largely negates the requirements for notice and implied consent under clause 7.1.1. Whilst clause 7.2 may only effect an equitable assignment, rather than a legal assignment, there is a technical rather than a substantive difference between the two. On Aviva's case, therefore, the limitation in clause 7.1.1 would have no substantive effect since the Employer would always be able to assign in

equity, to any future owner, the right to bring proceedings without the consent (actual or implied) of the Contractor.

25. Since the transfer of the freehold to Aviva was not made by the Employer, no right to bring proceedings could be assigned pursuant to clause 7.2. That is sufficient to deal with Shepherd's application to strike out and to do so in Shepherd's favour at least so far as any claims in contract are concerned. I address the position in respect of claims in tort further below.

Proceedings in the name of the Employer

26. If I am wrong about this, as I have said, Mr Leabeater has a fall back position, namely that all that can be assigned, as the clause says, is the right to bring proceedings in the name of the Employer. Thus the only claims that Aviva could advance (in the name of the Employer) are the Employer's claims and not its own claims.

27. I accept that submission. Firstly, that is, to my mind, what the clause says. Secondly, if the clause enabled the Employer to assign to a subsequent freehold owner the right to bring proceedings for breach of the Contract and claim that subsequent owner's losses, it would have the effect of permitting an assignment (without notice or consent) of the benefit of the Contract. That would be at odds with clause 7.1.1 and would carve out an exception which would render clause 7.1.1 almost, if not entirely, pointless.

28. Aviva's argument to the contrary turns on the repeated use of the words "assign", "assigned" and "assignment" in clause 7.2. In essence, Aviva's argument is that those words indicate that clause 7.2 is intended to confer on the Employer a right to assign (without notice and implied consent) and that that is the language of an equitable assignment. In the event of an equitable assignment, the Employer would have to be party to any proceedings and the clause, therefore, provides for the assignee to bring proceedings in the name of the Employer. The clause does not refer to proceedings in the name of the assignee and for the assignee's losses, since it is self-evident that the assignee would bring its claims in its own name. The reference to proceedings in the name of the Employer is then intended to mean that the assignee can <u>also</u> bring proceedings in the name of the Employer - that is, that the assignee can join the Employer to the proceedings as would be necessary in the event of an equitable assignment. In Aviva's submission this gives practical effect to the clause and accords with commercial common sense.

29. Ingenious though that argument is, it does not hold water:

    (i) Firstly, it assumes that the clause permits an equitable assignment of the benefit of the contract (without implied consent) and that is, in my view, wrong for the reasons set out at paragraph 27 above. The argument also runs contrary to Aviva's position that clause 7.1.1 is generous to the Employer – if the Employer can, with relative ease, effect a legal assignment in compliance with clause 7.1.1, there is no commercial need to confer an arguably more generous right under clause 7.2.

    (ii) Secondly, it involves an extremely strained reading of the words. If the clause had been intended to mean that an assignee was entitled to join the Employer to any proceedings it brought, the clause could simply have said so in terms.

30. None of this renders the clause otiose. As Mr Leabeater submitted, there may be executory obligations on the part of the Contractor which exist after practical completion, including obligations to make good defects and to pay liquidated damages. An assignment under clause 7.2 confers on the transferee the right to enforce those obligations as if it were the Employer, that is, in the name of the Employer. Further, at the time of transfer of the freehold, an Employer may well have accrued rights of value. The Employer may have carried out remedial works prior to the transfer. The commercial agreement for transfer of the freehold may take account of the transferee seeking recovery of those losses in the name of the Employer.

31. I should add for completeness that both parties referred me to the commentary on this clause (in like terms in another JCT standard form) in Keating on Construction Contracts 11th edition. Mr Leabeater had identified that the equivalent clause had first appeared in a JCT standard form contract by amendment made in 1987 and had been the subject of a commentary authored by Adrian Williamson in the 5th edition of Keating on Building Contracts published in 1991. The commentary on the JCT Standard Form of Building Contract 2016 edition in the 11th edition at paragraph 21-444 still has the same author, now Adrian Williamson QC; the text has remained unaltered; and neither the clause nor the commentary has been the subject of any judicial consideration.

32. The commentary reads as follows:

"*This sub-clause, where stated in the Contract Particulars to apply, qualifies the prohibition upon assignment to meet the practice of some Employers who transfer an interest in the building immediately upon Practical Completion. However, this right is extremely limited. Note that:*

(a) *such assignment may only be made after practical completion;*

(b) *it is not the benefit of the Contract that may be assigned but only "the right to bring proceedings in the name of the Employer", so that it is more akin to a contractual right of subrogation than an assignment proper; and*

(c) *the proceedings are themselves limited to proceedings "to enforce any of the terms of this contract made for the benefit of the Employer". It is likely that the sub-clause is intended to permit what is in effect an equitable assignment of the right to bring proceedings and the final sentence of the clause approximates to the principle that assignments are subject to equities. If this is the effect, then the assignee is nevertheless, on the wording of the sub-clause, limited to claiming the Employer's losses. It is possible that the use of the words "to enforce", and the omission of any reference to a right to obtain damages for breach of the contract, show an intention to restrict the proceedings to specific performance or other proceedings to compel the Contractor to carry out its contractual obligations. It is not easy in practice to conceive what contractual obligations of the Contractor might be specifically enforced after Practical Completion. For example, the obligation of the Contractor to make good defects under Cl.2.38 cannot be intended, it is submitted, to be embraced by this provision because of the general rule that a contract to carry out building works cannot be specifically enforced against the builder."*

33. Taking this apart:

(i) The first point made is that this clause confers an extremely limited entitlement. The point is made against the background of the unamended version of clause 7.1 but is no less pertinent in the context of the present clause 7.1.1.

(ii) The reference to a similarity with a subrogated claim is patently not intended to suggest that clause 7.2 gives rise to a subrogated claim. The point that Mr Williamson QC is making is that the claim in the name of the Employer is for the Employer's losses as a subrogated claim by an insurer would be for the losses of the insured.

(iii) The commentary suggests that it is likely that the sub-clause is intended to permit what is "in effect an equitable assignment of the right to bring proceedings". There is nothing in that that supports Aviva's position which is, in effect, that the clause permits an equitable assignment of the benefit of the contract without consent.

(iv) Indeed, the commentary goes on to express the view that the wording of the sub-clause (which must be a reference to "in the name of the Employer") means that the assignee is limited to claiming the Employer's losses.

(v) The commentary then goes on to consider a possible meaning of the clause which yet further limits the assignee's rights to the bringing of proceedings for specific performance or otherwise to compel the Contractor to carry out its obligations (post-practical completion). The commentator, it seems to me, doubts that proposition.

34. In his skeleton argument, Mr Fisher emphasised that this commentary did not refer to the wording in the clause *"in the event of a transfer by the Employer of his freehold or leasehold interest ……"*. Mr Fisher argues that that wording is critical to understanding the commercial purpose of the clause namely that the Employer should have the right to transfer its property interest unfettered by the need to obtain consent from the Contractor to assign its contractual interests in the building contract. There is, however, no reason why the Employer should have such an untrammelled right and it would be contrary to the limitation in clause 7.1.1.

35. Mr Leabeater did seek to argue that the possible interpretation in respect of specific performance which the commentary alludes to was the right one. It is unnecessary for me to decide this point and I do not do so. I express doubts about it, however. Although there may well be obligations on the Contractor post-practical completion (completion of making good defects; matters relating to what I will loosely refer to as final accounts; payment of liquidated damages), it seems to me that the words "to enforce" are as apt to apply to the enforcing of the terms of the contract by bringing a claim for damages as they are to a claim for specific performance. Further, as Mr Williamson's commentary observes, a contract to carry out building works will not commonly be enforced by an order for specific performance. But more detailed consideration of this part of the clause must await a case in which it is relevant on the facts.

Claims in tort

36. As I discussed above, clause 7.2 expressly provides for the assignment of "the right to bring proceedings in the name of the Employer …. to enforce any of the terms of this Contract made for the benefit of the Employer." It is thus concerned expressly with an assignment of contractual rights. It could not, therefore, be relied upon as a basis for the assignment of rights in tort.

37. As an alternative argument, however, Aviva contends that there is no prohibition on the assignment of tortious rights at all and that such rights could be and were assigned under the Deed, so that, at the least, their claims in tort should not be struck out. Clause 1.6 of the Deed did make express reference to the assignment of rights of action "under and arising out of the Contracts" and "whether arising in contract or in tort". There may be other answers to these claims – not least, as Mr Leabeater points out, because in the normal course no relevant duty of care would have been owed by Shepherd to Camstead (see *Robinson v PE Jones* [2011] EWCA Civ 9) so that there would be nothing capable of assignment. But that was not the basis for the application to strike out.

38. Aviva's case in this respect is inconsistent with reliance on clause 7.2, which on this argument is irrelevant, but that is not itself a reason to dismiss the argument. Rather the answer must turn on the scope of the prohibition on assignment under clause 7.1.1. Aviva submits that both clauses 7.1.1 and 7.2 are concerned only with rights arising pursuant to the Contract and that it is entirely open to Camstead to transfer its non-contractual rights of action.

39. As I said above, clause 7.1.1 is couched in permissive terms entitling the Employer to assign "the benefit of this contract". The effect of the notice requirements of the clause is to prohibit the assignment of "the benefit of this contract" unless notice has been given to the Contractor and the Contractor has not raised a reasonable objection.

40. Neither party was able to cite any authority on whether these words or similar words extend to rights in tort. It seems to me that the right way to approach this issue is to ask what gives rise to any rights in tort. Leaving to one side the unlikelihood of a relevant duty of care to prevent or avoid economic loss being owed to the Employer (see paragraph 37 above), any duty of that scope would arise only from the existence of the contract and the contractual obligations.

41. The pleaded case, at paragraph 42 of the Particulars of Claim, is that, further or alternatively to its contractual obligations/ warranties, "Shepherd owed a common law duty of care to the Employer to exercise reasonable skill and care to the Employer, which was coterminous with the obligation set out at clause 2.17.4.1 of the Building Contract." That clause, in summary, contains the Contractor's warranties that the Works have been designed with reasonable care and skill, that the Works will comprise materials and goods of merchantable quality and appropriate standards, and that the Works when completed will comply with statutory requirements.

42. There is no pleaded basis for a relevant duty of care arising or being imposed other than as a consequence of the existence of the Contract between the Contractor and Employer and the contractual obligations under that Contract. The duty of care is then, it seems to me, properly characterised as a benefit of the contract and caught by clause 7.1.1.

43. The point may be of limited practical effect for the very reason that the contractor is inherently unlikely to owe a duty of care to the employer to prevent or avoid economic loss, but that itself militates in favour of a broad concept of the "benefit" of the contract. In this instance, if the clause is capable of different meanings, commercial common sense very much militates in favour of a construction which captures causes of action in tort. There is no reason why the parties would prohibit the assignment of causes of action in contract without consent but leave the possibility of assignment of causes of action in tort untrammelled.

44. It is conceivable that there may be circumstances in which a duty of care, owed by a contractor to an employer, arises on a discrete factual basis and independent of the contract, and that an assignment of a cause of action based on such a duty would not be caught by clause 7.1.1, but that is not this case.

45. There is no pleaded case that a duty of care was owed by Shepherd to future owners of the property and, accordingly, although the issue was touched on in Mr Leabeater's skeleton argument, it does not seem to me that the issue arises.

Conclusion

46. My conclusion, therefore, is that the defendant's application to strike out succeeds and it follows that the claimants' application to join Camstead fails.