

IN THE ROYAL COURTS OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

BEFORE:

THE HONOURABLE MRS JUSTICE O'FARRELL DBE

BETWEEN:

BAE Systems Pension Funds Trustees Limited

**Claimant /
Applicant**

- and -

Royal & Sun Alliance Insurance PLC
Bowmer and Kirkland Limited
Geofirma Soils Engineering Limited
Twintec Limited (In Administration)
**T.E. Little and K. Bent practising as the Sprigg Little
Partnership**

Respondent
(1)Defendant
(2)Defendant
(3)Defendant
(4)Defendant

Legal Representation

Simon Hargreaves QC (of counsel) on behalf of the Applicant
Duncan McCall QC (of counsel) on behalf of the Respondent

First to Fourth Defendants not represented

Other Parties Present and their status

None identified

Judgment

Judgment date: 14th July 2017
Transcribed from 14:09:30 until 14:50:30

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The Honourable Mrs Justice O’Farrell DBE:

1. The claim before the Court today is a claim by the Claimant, BAE Systems Pension Funds Trustees Limited (BAE), to add Royal & Sun Alliance Insurance PLC (RSA) as a Co-Defendant to the claim. The background to the claim has been set out in an earlier judgment that I gave in this matter but I will summarise it as follows.
2. The claim arises out of the design and/or construction of high bay warehouse known as Unit 2, associated infrastructure, hardstanding and access road at land located at Road 1, Winsford Industrial Estate, Cheshire. The First Defendant, Bowmer and Kirkland Limited, were appointed as the design and build contractor for the works pursuant to the building contract dated the 11th February 2004. The Second Defendant, Geofirma Soils Engineering Limited, carried out soil stabilisation services for the works, engaged by B&K under a subcontract on or around the 25th June 2004. The Third Defendant, Twintec, was responsible for the design and construction of the steel fibre reinforced concrete slab at the property, engaged by B&K under a subcontract on or around 25th June 2004. The Fourth Defendant, Sprigg Little, was appointed as a consultant structural engineer in respect of the works, appointed by B&K pursuant to an appointment dated 11th February 2004.
3. The works were commenced on the 30th January 2004 and were completed in September 2004. On the 27th September 2004, B&K, Geofirma, Twintec and Sprigg Little entered into separate collateral warranties in favour of the Claimant, executed as deeds. The claim, in these proceedings, arises out of defects that are alleged to be in the design and construction of the works and the damages claimed are in excess of £10 million.
4. On the 24th August 2016, the Claimant issued protective proceedings against the First and Fourth Defendants. On the 28th April 2017, the claim was served. On the 23rd February 2017, Twintec was placed into administration. On the 15th March 2017, Twintec’s solicitors informed the Claimant’s solicitors that Twintec was insured by RSA under a policy of insurance and provided the Certificate of Insurance to the Claimant’s solicitors. On the 24th March 2017, the Claimant’s

solicitors wrote to RSA notifying them of the claim against Twintec and explaining that the Claimants now had a claim directly against RSA, notifying RSA of its intention to amend its claim form to include RSA as a Defendant relying on the provisions of the Third Parties (Rights against Insurers) Act [2010] the [2010] Act.

5. The claim form has been amended for the purpose of this application and the brief details of the claim that the Claimant is seeking to rely upon state as follows:

“The Claimant’s claim against the Fifth Defendant [RSA] is for indemnity and all damages and all declaratory relief and all statutory rights and/or relief and all further or other relief pursuant to, in connection with, for breach of, or otherwise in connection with a contract or contracts of insurance between the Fifth Defendant and Twintec Limited (In Administration) the Third Defendant’s rights under which have transferred to and vest in the Claimant including but not limited to a declaration as against RSA as to the Third Defendant’s liability to the Claimant and RSA’s liability or potential liability to the Third Defendant and now the Claimant as regards the aforesaid damage to and/or all defects in the property and associated and related losses.”

6. That application is opposed by RSA on two grounds. Firstly, it is submitted that RSA did not and does not provide cover in respect of any liability that Twintec may have to the Claimant under the relevant contract of insurance which, it is common ground, for today’s purposes, is Policy 400066, dated the 16th December 2015. Secondly, it is said that any dispute as to coverage under the policy, in any event, would be subject to French law and must be determined by arbitration or in the French courts. Therefore this Court does not have jurisdiction and should decline to join RSA as a Defendant to these proceedings.

7. The relevant provisions of the [2010 Act] are as follows:

Section 1 (1):

“This section applies if –

- a) a relevant person incurs a liability against which that person is insured under a contract of insurance or,
- b) a person who is subject to such a liability becomes a relevant person.”

Subsection 2:

“The rights of the relevant person under the contract against the insurer, in respect of the liability, are transferred to and vest in the person to whom the liability is or was incurred (the third party).

Subsection 3:

“The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person’s liability; but the third party may not enforce those rights without having established that liability.”

Subsection 4:

“For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, “establish” means “establish,”

- a) by virtue of a declaration under Section 2 ...
- b) by a judgment ...
- c) by an award in arbitral proceedings or by an arbitration or,
- d) by an enforceable agreement.”

Subsection 5:

“In this Act, a) references to an insured are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance.”

8. It is common ground that, for the purpose of the 2010 Act, Twintec is a relevant person. Section 1 provides that if the Claimant can establish liability against Twintec and if Twintec is insured against that liability under a policy by RSA, then Twintec's rights against RSA, under the policy, regarding that liability, are transferred to and vest in the Claimant. The Claimant can bring proceedings against RSA in respect of such liability but cannot enforce any claim against RSA without establishing Twintec's liability. Such liability can be established by way of declaratory relief, judgment or arbitral award.

9. Section 2 provides as follows:
 - 1) This section applies where a Person (P),
 - a) claims to have rights under a contract of insurance by virtue of a transfer under Section 1, but
 - b) has not yet established the insured's liability which is insured under that contract.

 - 2) P may bring proceedings against the insurer for either or both of the following -
 - a) a declaration as to the insured's liability to P,
 - b) a declaration as to the insurer's potential liability to P.

 - 3) In such proceedings P is entitled, subject to any defence on which the insurer may rely, to a declaration under subsection (2)(a) or (b), on proof of the insured's liability to P or (as the case may be) the insurer's potential liability to P.

 - 4) Where proceedings are brought under subsection (2)(a), the insurer may rely on any defence on which the insured could rely if those proceedings were proceedings brought against the insured in respect of the insured's liability to P.

 - 5) Where the court makes a declaration under this section, the effect of which is that the insurer is liable to P, the court may give the appropriate judgment against the insurer.

- 6) Where a person applying for a declaration under subsection (2)(b) is entitled or required, by virtue of the contract of insurance, to do so in arbitral proceedings, that person may also apply in the same proceedings for a declaration under subsection (2)(a).
 - 7) In the application of this section to arbitral proceedings subsection (6) is to be read as if “tribunal” were substituted for “court” and “make the appropriate award” for “give the appropriate judgment.”
 - 8) When bringing proceedings under subsection (2)(a), P may also make the insured a defendant to those proceedings.
 - 9) If (but only if) the insured is a defendant to proceedings under this section (whether by virtue of subsection (9) or otherwise) a declaration under subsection (2) binds the insured as well as the insurer.
 - 10) In this section, references to the insurer’s potential liability to P are references to the insurer’s liability in respect of the insured’s liability to P if established.
10. Therefore Section 2 makes provision for the Claimant to bring proceedings against RSA and to join Twintec so as to establish by way of declaration the liability of Twintec to the Claimant and secondly, the insurers, i.e. RSA’s, potential liability to the Claimant.
 11. RSA’s case is that Section 2 is not engaged because RSA does not provide cover under the policy in respect of the claim that is the subject of the present action. Reliance is placed on Clause 4.1 of the relevant policy which provides that:

“The cover shall apply to claims submitted to the insurance department of the policyholder or to the insurer during the period of validity of this policy. Activated by the claim the policy covers the insureds against the financial consequences of the losses as long as the harmful event predates the policy termination or expiry date and the first claim was submitted to the insured or their insurer between the initial start date of the policy and the expiry of a period subsequent to its termination or expiry date

mentioned in this policy irrespective of the date of the other component parts of the losses. However, the policy shall only cover losses if this harmful event was known by the insurers after the termination or expiry date if at the time that the insureds learn of this harmful event, the cover has not been renewed or has been on the basis of activation by the harmful event. The insurer shall not cover the insureds against the financial consequences of losses if it is established that the insureds were aware of the harmful event on the date upon which the policy was taken out.”

12. In this case, RSA’s case is that Twintec was aware of the relevant harmful event on the date that the policy was taken out with RSA. Reliance is placed, in particular, on two documents. The first is that, on the 19th October 2004, the UK Finance Director of Twintec signed a professional indemnity insurance proposal form in which he identified a circumstance which might give rise to a claim against Twintec relating to the concrete slab in the development, the subject of these proceedings. Secondly, on the 29th November 2007, Withers LLP, on behalf of their Claimant, Henkel Loctite Adhesives Limited, a tenant of the property in question, wrote to Twintec in relation to the property, the subject of these proceedings, referring to alleged defects in the concrete slab.
13. It is RSA’s case that Twintec had knowledge of a claim, or potential claim, against it in respect of the concrete slab, which is the subject of these proceedings, as at the date on which the relevant policy was taken out. Therefore RSA did not provide any cover in respect of any liability that Twintec might be found liable for to the Claimant in this case. It is disputed by the Claimant that Twintec was aware of the relevant harmful event on the date on which the policy was taken out.
14. It has been suggested by Mr McCall, for RSA, that there has been no substantive challenge to the correspondence relied on by RSA indicating that no cover would arise by reason of Clause 4.1. However, I accept the submission of Mr Hargreaves, for the Claimant, that it has been asserted that there is a claim against Twintec in relation to the project, the full details of which have yet to be investigated. Certainly, for the purposes of today, there is an argument that the documents relied upon in 2004 and 2007, may relate to different defects that are

now complained of, and the subject of these proceedings, in the claim by the Claimant against Twintec in respect of the slab.

15. In my judgment, Section 2 (1) is engaged even where there is a potential dispute as to whether or not there is the appropriate cover under the policy. Section 2 (1), in particular, provides that this section applies where a person, in this case the Claimant, claims to have rights under a contract of insurance by virtue of a transfer under Section 1. It is suggested by Mr McCall that that section does not apply unless it can be established that there is a relevant contract of insurance but I prefer the submission of Mr Hargreaves that what is required, as a precondition, is a claim on the part of the Claimant that it does have such rights.
16. In order to establish liability on the part of RSA it is necessary for the Claimant to establish not just Twintec's liability but also that such liability is insured under the contract. It is not necessary for those matters to be established before Section 2 is engaged. On the contrary, Section 2 provides for the mechanism by which such liability is or is not established. It is clear from the wording of Section 2 (1), the claim to have rights under a contract of insurance by virtue of a transfer does not require the Claimant to establish those rights, it simply requires the Claimant to make a claim that it has such rights. It also makes clear from subsection (1)(a) that Section 2 applies where the Claimant has not yet established either the insured's liability, that is Twintec's liability in this case, or what is insured under that contract, i.e. that any liability Twintec might have is insured under the relevant contract of insurance.
17. I am satisfied that Section 2 is engaged wherever the Claimant claims that the insured is a relevant person, that the insured has liability to the Claimant, that the insured has insurance in respect of that liability and that therefore there is a transfer under Section 1 of the 2010 Act. The Claimant does not have to establish those rights before Section 2 operates. Section 2 provides the machinery for establishing the existence of those rights.
18. Mr McCall has raised a number of difficulties that, he says, will arise if Section 2 applies even where cover is disputed. He claims that if that is correct the Claimant could join any insurer into an action under Section 2(2(a) or perhaps an insurer who had provided cover for a previous irrelevant period or in respect of a different

risk. However, if a claim were to be made in circumstances where it was simply unarguable that any relevant cover was in place this Court could, of course, strike out such proceedings as having no real prospect of success.

19. In this case it is not disputed that RSA is indeed an insurer under a contract of insurance to which Twintec is a party. It is also not disputed that the policy of insurance provides indemnity in respect of losses as a result of liability of the kind that is asserted by the Claimant in these proceedings. The only issue is whether by virtue of Clause 4.1 there is cover on the facts of this case.
20. It is also said, by Mr McCall, that there are irreconcilable conceptual and legal problems for an insurer in RSA's position if it were to be joined into the English proceedings. First of all, Mr McCall questions whether RSA would be entitled to defend the claim for a declaration that Twintec is liable to the Claimant because if there were no coverage as contended for, by RSA, it would not have a right to step into Twintec's shoes. It seems to me that the answer to that is straightforward. If RSA is joined as a Defendant in these proceedings clearly it is entitled to make such submissions and call such evidence as it wishes to make in response to the claims by the Claimant
21. Secondly, it is a matter for RSA to decide whether it wishes to conduct any substantive defence to any claim by the Claimant or whether it simply wishes to take no part in the proceedings on the basis that it is satisfied that it has a good defence that there is no coverage.
22. Thirdly, it is of course, always open to RSA to seek declarations and/or have preliminary issues determined in respect of the issue of coverage, whether here or in another jurisdiction.
23. Fourthly, it is submitted by Mr McCall that RSA would be forced to incur substantial costs in defending a claim for a declaration as to Twintec's liability to the Claimant before any issue of RSA's liability to Twintec has been determined and therefore that would involve wasted costs on the part of RSA. Of course, whether such costs are wasted would depend on the outcome of the issue of coverage but, in any event, as I have already indicated, it is a matter for RSA to

decide whether it wishes to have the issue of coverage determined before the main trial.

24. None of those matters disturb the court's finding, as to the applicability of Section 2 of the 2010 Act in a case such as the present. It is for the Claimant to establish both Twintec's liability to the Claimant and RSA's potential liability to the Claimant. It can do so by activating Section 2 without establishing, by way of a precondition, that there is valid coverage under the policy as appears to be in dispute in this case. For those reasons, I am satisfied that the Claimant is entitled to seek a declaration under Section 2 (2)(a), as to Twintec's liability to the Claimant.
25. I then turn to the second limb of Mr McCall's argument which is that the Claimant may not seek a declaration under Section 2 (2)(b) as to RSA's potential liability to the Claimant because the insurance policy in question contains jurisdictional clauses the effect of which is that this matter has to be decided under French law, in arbitration or in the French courts. The relevant provisions are:

Clause 5.9:

“In the event of disagreement between the insurer and the policyholder regarding the interpretation or performance of this policy, the disputes shall be referred to the French courts and shall be subject exclusively to French legislation.”

Clause 5.10:

“In the event of a dispute in relation to the activation of the cover or to the determination of business practices, the parties agree, prior to any legal action, to refer their disputes to two arbitrators chosen by each party, which arbitrators should, in the absence of any agreement within a period of three months, elicit the assistance of a third arbitrator designated by them or by the presiding judge of the high court within whose territorial jurisdiction the insured's registered office is located.”

26. I have the benefit of the expert legal opinion of Alexis Valencon set out in his witness statement dated the 6th June 2017. In that opinion he states that Clause 5.9 contains a valid choice of law provision in favour of French law. There is a very clear choice of law clause and French law is applicable to the policy. Secondly, he provides an opinion that Clause 5.9 acts as an exclusive jurisdiction clause in respect of the French courts. It is common ground between the parties that the jurisdiction clause providing for the French courts to determine disputes that are caught by Clause 5.9 acts as an exclusive jurisdiction clause by reference to Article 25 of (EU) Regulation 1215/2012. Therefore if the dispute is caught by Clause 5.9 it is common ground that the French courts have exclusive jurisdiction.
27. In respect of Clause 5.10, Monsieur Valencon expresses the opinion that there is a valid arbitration clause. From the translation, that there is a clear arbitration clause set out at that clause in the policy. There is an issue by reference to the characterisation of the coverage dispute in this case whether the dispute is caught by either or both of Clauses 5.9 and 5.10. As to this, Mr Valencon is ambivalent in that he considers that the dispute as to coverage could bring into play Clause 5.9, as a dispute concerning the performance of the policy, or it could bring into play Clause 5.10, regarding activation of the cover.
28. The Claimant's position is that the coverage dispute is not caught by either Clause 5.9 or 5.10. RSA's position is that the coverage dispute is caught by both 5.9 and 5.10. It is unlikely that either of those positions is correct bearing in mind the opinion of Lord Hoffmann in the Fiona Trust case. It is highly likely that commercial entities entering into a commercial contract of this nature will have intended that the dispute resolution provisions cover all disputes that are likely to arise in respect of their relationship. It is also highly likely that the parties will have intended that where differing dispute resolution provisions are contained in the contract that they will cover different types of dispute, i.e. it is unlikely that commercial businessmen will have intended there to be an overlap between Clauses 5.9 and 5.10.
29. When pressed, Mr Hargreaves for the Claimant, expressed the view that it was more likely that the coverage dispute would be covered by the arbitration provision and, Mr McCall, for RSA, expressed the view that it was more likely that the coverage dispute would be covered by the litigation provision.

Fortunately, I do not have to resolve that dispute. For today's purposes I am satisfied that the coverage dispute would be covered by either Clause 5.9 (and therefore subject to the exclusive jurisdiction of the French courts) or 5.10 (and therefore subject to arbitration).

30. On that basis any dispute as between the Claimant and RSA in respect of the coverage issue, namely whether any liability on the part of Twintec to the Claimant is covered by the policy between Twintec and RSA, is a matter that should be decided either by the French courts or in arbitration and therefore is not a matter in respect of which this Court should make a determination.
31. That brings me therefore to the disposal of this application. What I propose to do is to grant the Claimant's application to join RSA as set out in the draft amended claim form but to stay proceedings against RSA in respect of the application for a declaration as to RSA's liability or potential liability to Twintec and the Claimant, i.e. I will stay the proceedings under Section 2 (2)(b) but allow the proceedings to go ahead in respect of Section 2 (2)(a).
32. The reason for the stay of the Section 2 (2)(b) claim is that, as ventilated at the last hearing, there are potential limitation problems in this case. It would be rather unfortunate if it were to be decided some way down the line that the appropriate forum for determining the coverage dispute, despite the jurisdiction clauses to which I have referred, is in fact this Court, only to find that there is a limitation problem. So I am going to allow joinder in respect of 2 (2)(b) but stay that part of the proceedings. If it turns out that proceedings are started in France or an arbitration is started then this Court can deal with any case management issues or difficulties that arise at that stage.

This Transcript has been approved by the Judge.

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