Neutral Citation Number: [2024] EWHC 2925 (TCC)

Case No: HT-2023-000254

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 15/11/2024

Before:

MR ANDREW MITCHELL KC

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

PEABODY TRUST	**Claimant**
- and -	
NATIONAL HOUSE-BUILDING COUNCIL	**Defendant**

- -
- -

Mr Noel Casey KC (instructed by **Devonshires Solicitors LLP**) for the Claimant
Mr Thomas Grant KC (instructed by **BP Collins LLP**) for the Defendant

Hearing date: 25 October 2024

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Approved Judgment

This judgment was handed down remotely at 3:30pm on 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Andrew Mitchell KC (sitting as a Deputy Judge of the High Court):

1. I have before me this afternoon an application for permission to appeal supported by fairly high level draft Grounds but with a detailed skeleton argument of 23 pages. Much of that seeks to re-argue the points on the summary application or at least argue some of the points more fully. I note that the time estimate for this application for PTA was 2 hours, and we have spent the best part of an hour on it, which I note somewhat ironically was about half the estimate for the substantive application itself heard in June.

2. I am grateful for the detail of Mr Grant's submissions but given the nature of this application and the views expressed in the Judgment, and with no disrespect to him, it is not necessary or perhaps appropriate even for me to respond in that level of detail. The sole question is whether there is a real prospect of persuading an appellate court on any of the Grounds. I refuse PTA. My brief reasons are as follows:

3. Generally, and in particular as regards the challenge to the judgment on the Insolvency Point itself, the Court found that time did not run from the insolvency (or fraud) simpliciter but from the moment when the insured had to pay more (or sums paid were lost). The fact that on the materials and incomplete evidence before the Court, taking into account also the unsatisfactory manner of their presentation, and the tight if not inadequate time estimate, it was not sufficiently clear (for the purposes of the test on summary judgment) to rule when, on the facts, the moment of having to pay more arose, did not mean that the time ran from insolvency.

4. Furthermore, since the factual question of when more had to be paid was not a matter which could be fairly determined on a summary basis in the circumstances, and therefore the claim could not be struck out on that basis, the decision of the Court also to defer any question of construction (i.e. as to what was the true meaning of had to pay more), itself undeveloped in argument and on the materials, was plainly a decision open to the Court under Part 24.3(b) and its general case management powers to deal with cases justly.

5. For the avoidance of doubt, in light of some of Mr Grant's submissions today, the Court has not determined that having to pay more means when the sums were actually paid. I referred in the Judgment [30] to a number of possibilities. I acknowledge that was the way in which, in at least one part of his evidence, Mr London put it, but I have not resolved this. I have deferred questions of construction, simply because it is unnecessary to resolve that issue in circumstances where on the facts there are matters fit for trial.

6. The Court was alive to the submission that, if the parties would have considered (at the time of entering into the Policies) that it might prove difficult to say when the point of having to pay more might occur in any particular case, the parties must have intended a more certain start date of insolvency. The Court indeed referred to a number of potential arguments as to when the date might be, noting that the answer (at least on the material then before the Court) might be uncertain. Or at least was sufficiently uncertain or complicated for the purposes of summary determination. But in my judgment the wording is clear.

7. Whether in fact there is or will prove to be any great difficulty in applying the test of having to pay more in this case remains to be seen – perhaps the service of a Defence and Reply, disclosure and (as envisaged by Judgment/33) perhaps further evidence will assist in the crystallization of any real dispute there. But the fact that the parties agreed a trigger point, if I can call it that, which might (or might not) prove difficult to apply in any particular case does not mean that they intended to have a completely certain trigger of insolvency, or fraud. If they had wanted that sort of certainty, they could easily have provided for it, as I said in the Judgment.

8. My final general observation is that I was not greatly persuaded on the question of 'compelling reason' by the submission that the case has attracted some attention in publications. With no disrespect to the law firm websites, their short case notes are exactly that and they are essentially promotional material. None the worse for that, but they do not criticize the judgment or suggest that the Judgment had caused surprise or concern in the industry; insofar as they provide any analysis at all, the overall tone is rather that the judgment provides useful clarification. The same applies to the trade press, if that be the right description.

9. Turning more specifically to the Grounds themselves briefly.

10. Ground 1 – I do not consider there is any real prospect of success here – ultimately this is a straightforward issue of construction. The submissions today are essentially a re-run of the arguments on the application. They were elegantly put but I am afraid Mr Grant must persuade the Court of Appeal on an application.

11. Ground 2 - this ignores the fact that this was a summary disposal application brought on a narrow basis; the reasons why the Court was ultimately not prepared (or able) to deal with an alternative basis on a summary application were rooted essentially in issues of procedural fairness, practicality, and case management; bearing in mind the requirement of the overriding objective of dealing with issues justly and fairly. There is no real prospect of the Court of Appeal saying that the Court's approach was not open to the Court. The rule of law relied upon was expressly considered in the Judgment and is not in dispute, so far as it goes.

12. Ground 3 – this too concerns the case on the facts as to when more had to be paid. There is no real prospect of the Court of Appeal saying that the Court should have determined that case in the circumstances described in the Judgment, including that the evidence was incomplete, and proper argument had not been heard and the time estimate was inadequate or became inadequate to deal with it properly. I note the salutary contents of the Practice Note at [2022] Bus LR 520 the substance of which, although expressly directed at the Commercial Court, would apply as much to the TCC, and any other business/commercial court, particularly where listing arrangements for both the TCC and Commercial Court are handled by the same Listing Office. I do want to add about the time estimate that although I was critical of it, I do appreciate that it is not always easy to get estimates right particularly when matters change.

13. Ground 4. There was no application for an adjournment. And the Defendant did not contend that the Court could not determine the Insolvency Point on its own, or without determining the factual dispute as to when more had to be paid [see paras 39 and 40 of the Judgment]. Indeed, that was the basis of its Application originally – that there was a discrete point which could be determined as such. The decision to proceed and not take an adjournment point of its own motion is not something that there is a realistic prospect of the Court of Appeal interfering with, being essentially a question of how the hearing should be managed and how the issues should be properly dealt with. As Mr Casey says, I have not resolved these issues but merely deferred them until trial. I say until trial, but of course if matters change, there is further evidence etc., there may be a shorter cut than trial. I said as much in Judgment/33.

14. Ground 5: briefly, I do not consider there is a real prospect of success on the point of construction. There is also no real prospect of challenging the Court's decision that it was unable or not prepared on the materials (and in the circumstances of their presentation) to determine summarily the factual question whether that particular claim was time barred as a matter of fact.

15. I reserve the right to tidy up these ex tempore reasons if a transcript becomes available.