Point West London Ltd v Mivan Ltd
[2012] EWHC 1223 (TCC)

Point West London Ltd (Point West) employed Mivan Ltd (Mivan) to carry out the design and construction of a marketing suite, sky lobby and 48 apartments in London (the Phase 4 Works). A practical completion certificate was issued in relation to the Phase 4 Works in June 2001. No certificate of making good defects was issued and in July 2002 Mivan’s final account was agreed in the sum of approximately £12.5 million. The original contract sum was over £10 million and included a provisional sum of £750,000 for the fit out works to the penthouse flat on floors 16, 17 and 18 (Flat 1601). Flat 1601 was sold by Point West in July 2002 to Rothschild Trust (Bermuda) Ltd (the trust). Prior to the sale a retention was held back against defects.

By October 2007 Point West and Mivan were aware that there were persistent, known and unresolved defects in the curtain walling system in relation to Flat 1601 and that investigations and remedial works over the course of nearly six years had not fully remedied those defects. There were also issues with the heating and cooling system in Flat 1601.

Mivan subsequently sought additional payment in respect of snagging works and by way of an exchange of letters between Point West and Mivan in October 2007 it was agreed that Point West would pay Mivan £50,000 as final assessment of moneys due and ‘any and all outstanding matters’. This payment was subject to Mivan providing reasonable assistance to Point West in relation to legal proceedings (for unpaid service charges, payment of retention and other sums outstanding under the lease) which Point West intended to commence against the trust regarding Flat 1601 (which would not include any further remedial works).

In November 2007 Point West commenced legal proceedings against the trust, which counterclaimed as a result of the defects in relation to the curtain walling and the heating and cooling system and ultimately damages were awarded against Point West.

In August 2011 Point West commenced CPR Pt 8 proceedings seeking a declaration that the settlement reached in October 2007 did not exclude Mivan’s liability for breach of contract, including in particular liability for any latent defects which existed in October 2007. Mivan alleged that the settlement agreement covered both damages in relation to the defects which formed the subject of the county court proceedings and any other patent defects at the time.

Held

Ramsey J agreed with Mivan’s interpretation of the settlement and held that the settlement agreement covered liability for the defects forming the subject matter of the county court proceedings and any other patent defects at the time.

The court considered the principles applicable to the construction of a contract, including that the court should consider the background knowledge which would reasonably have been available to the parties (as per Investors’ Compensation Scheme Ltd v West Bromwich Building Society, Investors’ Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98). Ramsey J also confirmed that, although the court should be slow to infer that a party intended to surrender rights and claims of which it was unaware and could not have been aware, no special rule applies to the construction of a settlement agreement.
The court then considered the factual background behind the settlement agreement, which suggested that the letters intended to refer to both additional money due to Mivan and the patent defects, that the agreement was intended to be in full and final settlement of the same and that the reference to remedial works could only be construed as releasing Mivan from liability for the defects.

**Significance**
This case confirms the importance of drafting settlement agreements as clearly as possible: if the scope is too wide, there will be a risk that the agreement will cover further liabilities than is envisaged at the time.

In addition, this judgment serves as a reminder that when construing a contract of any kind (including a settlement agreement), the court may have regard to the factual matrix within which agreement was reached and provides a good summary of the law on contract interpretation.

**WW Gear Construction Ltd v McGee Group Ltd**

*2012* EWHC 1509 (TCC)
TCC; Edwards-Stuart J

WW Gear Construction Ltd (WW Gear) and McGee Group Ltd (McGee) entered into a trade contract under which McGee agreed to carry out the excavation and associated groundworks for a development in London (the contract). The contract sum was £1.8m.

Clause 4.6 of the contract dealt with the value of variations and included a proviso that:

‘no allowance shall be made under clause 4.6 for any effect upon the regular progress of the Works for any other direct loss and/or expense for which the Trade Contractor would be reimbursed by payment under any other provision of this Trade Contract.’

Clauses 4.21–4.25 concerned McGee’s right to recover loss and expense incurred as a result of matters materially affecting the progress of the works.

In April 2012 McGee commenced what was the fourth adjudication between the parties, claiming £2.5 million, mainly as a result of variations. Whilst the adjudication was ongoing, WW Gear commenced CPR Pt 8 proceedings seeking a declaration that: McGee was not entitled to recover loss and expense under cl 4.6 where the regular progress of the works had been affected by a matter listed in cl 4.22; and the proviso in cl 4.6 meant that any such claim must be made under cl 4.21. McGee could not claim under cl 4.21 as it had not submitted a notice within the time required. McGee opposed the application and argued that the court could not grant a declaration because: it did not have jurisdiction to do so; it would amount to unwarranted interference in the adjudication process; and the declaration sought blurred the distinction between issues of legal interpretation and questions of fact and would be of limited utility.

The application came before the court two days before the adjudicator was due to give his decision.

**Held**
The court held that it did have jurisdiction to grant the declaration, on the basis that it has a relatively wide power to do so. Paragraph 9.4.1 of the TCC Guide lists issues in relation to which the court will hear applications for declaratory relief, but this is not exclusive.

Ultimately, Edwards-Stuart J found that a declaration would be inappropriate as it would amount to unwarranted interference with the adjudication process. Given that the adjudicator was due to give his decision in two days, he would have very little time to take account of any judgment. This is likely to be the case with the majority of applications made during an adjudication given that it usually takes at least 14 days to commence court proceedings following the issue of a claim form.

It was also held that the proviso in cl 4.6 prevented McGee from recovering twice for the same matter: it did not prevent McGee from claiming under cl 4.6 if it was unable to make a claim under another provision of the contract.

**Significance**
This case highlights the difficulties of making a Pt 8 application during an adjudication given the limited time an adjudicator has to make a decision. For referring parties it would be prudent to make any application before commencing the adjudication, if possible. For responding parties, the best approach may be to attempt to agree and/or apply for an extension to the timetable to take into account any proposed court proceedings. 

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October 2012