



Neutral Citation Number: [2024] EWHC 3067 (TCC)

Case No: HT-2024-LDS-000014

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN LEEDS**  
**Technology and Construction Court (KBD)**

The Business and Property Courts in Leeds Westgate House  
6 Grace Street  
Leeds LS1 2RP

**Before :**

**Her Honour Judge Kelly sitting as a Judge of the High Court**

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**Between :**

**GRAIN COMMUNICATIONS LIMITED**

**Claimant**

**- and -**

**SHEPHERD GROUNDWORKS LIMITED**

**Defendant**

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**Mr Adam Beaumont** (instructed by **Ward Hadaway LLP**) for the **Claimant**  
**The Defendant** did not appear and was not represented.

Hearing date: 30 September 2024  
Handed down: 29 November 2024

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**APPROVED JUDGMENT**

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 29 November 2024.

**Her Honour Judge Kelly**

**Introduction**

1. This case concerns a contract for the performance of works by the Defendant for the Claimant. Pursuant to the framework agreement dated 20 January 2022 and the Work Order Number: 11500 dated 7 September 2023, work was to be done by the Defendant at the area known as Blyth Phase 3.
2. This judgment follows the hearing of a Part 8 claim arising out of an adjudication. The Adjudicator decided that the Defendant had a common law right to recover damages for loss of profit and/or mobilisation and demobilisation as a result of the Claimant's e-mail to the Defendant dated 24 October 2023 stating that works under the Work Order would not commence imminently but would most likely take place the following year in 2024.
3. The Claimant asserts that on a proper review of the facts and contractual provisions, the e-mail amounted to a variation of the contract and not a breach of contract. Further, if the e-mail did constitute a variation, that variation would not entitle the Defendant to the losses claimed, but only an entitlement to have its claim valued by the Claimant in accordance with the contract.
4. The Claimant seeks a declaration that it is not and was not in breach of the terms of the Blyth Work Order, or the framework agreement, when it informed the Defendant of the postponement of the Blyth Phase 3 Work Order. In addition, the Claimant seeks a declaration that to the extent it is in breach of either the Blyth Work Order or the framework agreement, it is not liable to the Defendant for the mobilisation and/or demobilisation costs or loss of profit allegedly suffered by the Defendant.

5. The Defendant asserts that the application made by the Claimant is not appropriate for Part 8 proceedings because there is conflicting evidence of fact. Further, it asserts that the Court should not make the declarations sought because there is no merit to them.
6. The Claimant was represented by Mr Adam Beaumont of counsel. Whilst the Defendant was previously represented by Mr. David Fearon of counsel, who made written submissions on behalf of the Defendant earlier in the proceedings, there was no attendance nor any representation for the Defendant at the hearing. I have, of course, considered the written submissions made by the Defendant.

### **Background and Evidence**

7. This background is based upon the neutral chronology provided by the Claimant and upon the facts agreed between the parties. The majority of the facts were agreed between the parties. There were some extra matters which the Defendant sought to include in the schedule of agreed facts. Those matters were largely agreed by the Claimant. I have taken those matters into account when coming to my decision. However, I accept the submission made by Mr Beaumont for the Claimant that those facts do not assist me in the interpretation of the contract and whether or not to make the declarations sought.
8. The Claimant is a company whose business is wireless telecommunication activities. The Defendant is a company whose business is the provision of specialised construction activities. The parties entered into a framework agreement on 20 January 2022 relating to the provision of underground duct laying, jointing chamber and toby box construction and other associated works in the North East of England.
9. Under the terms of the framework agreement, the Claimant was the employer and the Defendant the contractor. The framework agreement permitted the Claimant to instruct the Defendant to perform works and services for the Claimant in accordance with the terms of the framework agreement. Works and services were to be performed by the Defendant in accordance with each Work Order provided by the Claimant. The Work Order which this dispute concerns was entered into by the parties on 7 September 2023.

10. The relevant terms of the framework agreement are as follows:

**3. Obligations**

3.2

The Contractor shall not do any work within the Framework Scope until it has received a Work Order for that work.

3.3

Notwithstanding clause 3.2, the Employer makes no representation or guarantee that it will issue a Work Order to the Contractor, and the Employer retains the absolute right to award works within the Framework Scope to other contractors. The Employer shall not in any event be liable to the Contractor whether in contract (including, without limitation, any indemnity), tort (including, without limitation, negligence), breach of statutory duty or otherwise for any loss of income, profits, production, business or opportunity (whether direct or indirect in nature)”

**4. Work Order**

4.1

If the Employer requires work to be carried out within the Framework Scope, the Employer shall, at its sole discretion, issue a Work Order instructing the Contractor to carry out and complete the Works in accordance with this Framework Agreement and such Work Order.

4.2

The Contractor acknowledges that the Employer has no liability to pay the Contractor for any works and/or services under this Framework Agreement unless and until the Contractor has signed and executed as a deed the relevant Work Order issued under clause 4.1.

**SCHEDULE B – PRICING DOCUMENTS**

1. Definitions

Unit Pricing - The pricing mechanism and approach elected by the Employer as detailed in this Schedule B and in each Work Order 2.

Unit Pricing

2.1

The Unit Pricing applicable to each Work Order shall be clearly documented in the Work Order and, at the Employer’s sole option, either be chargeable:

2.1.1 on a fixed Price Per Plot basis, whereby the following shall apply:

2.1.1.1 the Price Per Plot for delivering the requirements of the Work Order shall be detailed in each Work Order;

2.1.1.2 the Price Per Plot shall be payable for each Plot connected up to the maximum number of Plots stated in each Work Order, providing all requirements of the Work Order have been duly completed...

**SCHEDULE D - WORK ORDER TERMS AND CONDITIONS**

**1. Interpretation**

The following definitions and rules of interpretation apply in this Work Order.

1.1 Variation means any addition to, omission from or other change in the Works or the period or order in which they are to be carried out.

**8. Commencement and Completion**

8.1 The Contractor shall commence the Works on the Commencement Date and complete the Works on or before the Completion Date subject to any extension of time under clause 8.3. The Contractor shall carry out the Works in accordance with any agreed programme.

8.2 The Works shall be carried out within standard working hours set out in the Order Information.

8.3 If the Contractor is delayed in completing the Works by the Completion Date for reasons beyond the Contractor's control, including, the ordering of any Variation (provided such Variation is not occasioned by the Contractor's default), the Contractor shall notify the Employer in writing and shall provide such details as the Employer reasonably requires. Subject to clauses 8.4, 8.6, 8.7 and 8.8, the Employer shall give such extension of time (if any) to the Completion Date as may be reasonable, and notify the Contractor accordingly.

8.4 Where any Variation is necessary as a result of any negligence, act, omission, breach or default of the Contractor or any person employed or engaged by the Contractor, the Variation shall be carried out by the Contractor entirely at the Contractor's own cost and expense and the Contractor shall not be entitled to any payment or to any loss and/or expense, or any extension of time to the period(s) of completion of the Contractor's obligations under this Work Order in respect of such Variation.

8.5 The Employer shall determine and notify the Contractor in writing of the date when the Works are complete.

8.6 Notwithstanding any other provision, the Contractor shall not become entitled to any payment, any loss and/or expense, or to any extension of time for the completion of the Works or any part of them on account of any circumstance arising by reason of any error, omission, negligence or default of the Contractor or of any sub-contractor or supplier, or of any of his or their employees or agents, including but not limited to the Contractor's failure to notify the Employer timeously setting out details of the information the Contractor requires to comply with the Contractor's obligations under this Work Order; or for any delay which is concurrent with another delay for which the Contractor is responsible.

8.7 Where NRSWA applies to the Works, the Employer shall make the relevant application to the street authority under NRSWA. The Contractor shall be entitled to an extension of time under clause 8.3 only to the extent the street authority agrees to such extension for completion and reinstatement, and not otherwise.

8.8 The Contractor shall constantly use his best endeavours to prevent delay in the progress of the Works, and to mitigate the effects thereof, however caused, and to prevent the completion of the Works being delayed or further delayed beyond the Completion Date.

8.9 If the Employer wishes to investigate the possibility of achieving completion of the Works before the Completion Date, it shall invite the Contractor to provide a quote identifying the time that can be saved and any additional associated cost. The

Employer shall be under no obligation to accept the Contractor's quote, and reserves the right to negotiate any proposed costings with the Contractor.

### **11 Variations**

11.1 The Employer may, without invalidating this Work Order, issue instructions requiring a Variation. The Contractor shall forthwith comply with all instructions issued to the Contractor under this clause 11.

11.2 Any oral instructions given by the Employer requiring a Variation shall be confirmed in writing by the Employer.

11.3 The Contractor shall not be entitled to payment for any Variation for which the instruction is not given or confirmed in writing.

11.4 Variations shall be valued by the Employer on a fair and reasonable basis with reference to, where available and relevant, rates and prices in the Pricing Document.

11.5 Notwithstanding any other provision of this Work Order, the Contractor shall not become entitled to any additional payment for any Variation where the Variation has been instructed on account of any circumstance arising by reason of any error, omission, negligence or default of the Contractor or of the Contractor's subcontractors or suppliers, or of any of the Contractors or their employees or agents.

11. On 3 and 4 August 2023, representatives of the Defendant and the Claimant physically walked and surveyed the area for the Blyth Phase 3, 11500 Work Order. On 7 September 2023 at 09:47, the Claimant sent an email to the Defendant. Attached to the email was the Blyth Phase 3, 11500 Work Order and Network Specification Drawing for the Site which contained the drawing and information for the Defendant to complete the Blyth 11500 Work Order.
12. On 16 October 2023, timed at 10:37am Johnathon Bowden of the Defendant sent an email to the Grain Permit Division requesting the Claimant apply for 17 Streetwork permits to Northumberland County Council in respect of the Blyth Phase 3, 11500 Work Order. On 16th October 2023, timed at 12:38pm, the Grain Permit Division of the Claimant replied to the Defendant to advise that the Streetwork permits sent by the Defendant have been submitted by the Claimant to Northumberland County Council in respect of the Blyth Phase 3, 11500 Work Order.
13. An email was sent on 23 October 2023 at or around 9:21am by Barry Griffiths of the Claimant and received by Phil Crumbie and Peter Shepherd of the Defendant, which e-mail indicated that a pre-start meeting would be held on the afternoon of 23 October

2023 with the intention of starting work on Blyth Phase 3 the following day. Later on 23rd of October 2023 at 09:47am, the Defendant received an email from the Claimant, which attached a number of Streetwork permits. One of the attachments was entitled Permits Granted Report 23.10.23, which email included 13 Streetwork permits granted by Northumberland County Council in respect of the Blyth Phase 3, 11500 Work Order.

14. No pre-start meeting occurred on 23 October 2023. Instead, a phone call took place between Richard Cameron and Peter Shepherd on 23 October 2023, when Richard Cameron told Peter Shepherd that the Blyth Work Order would not be starting the next day as had previously been agreed.
15. The Defendant sent to the Claimant an e-mail from Peter Sheperd to Richard Cameron on 23 October 2023 at 11:43pm as follows:

“Can we just have conformation [sic] that all contracts signed will not be going ahead as mentioned today”.
16. An email on 24 October 2023 at or around 12:13am from Richard Cameron of the Claimant to Peter Shepherd of the Defendant confirmed an intention to continue with the Work Order but not before the end of 2023. The e-mail read:

“Dear Peter  
Thank you for your emails. As discussed, it remains our current intention to continue with all Work Orders signed between Grain Communications Ltd and Shepherd Groundworks Ltd.  
However, as mentioned on Monday's call, we are in further discussions with relevant stakeholders in relation to our build programme, and it currently does not look like we will be able to commence Works on Site in relation to the following Work Orders before the end of 2023:  
\* Blyth Phase 3;  
\* Newcastle Phase 8;  
\* Newcastle Phase 9; and \* Wallsend Phase 5.  
All other Work Orders are unaffected.  
We will continue to keep in touch with you regarding our programme for the Works under these Work Orders and will let you know when anything changes. Regards  
Richard”

The Claimant cancelled the permits granted on 24 October 2023 for re-submission at an appropriate future date as the works would not commence before the end of 2023.

17. On or around 9 February 2024 the Defendant sent, and the Claimant received, a letter entitled “Notice of Suspension of Performance of the Works”. On or around 11 February 2024 the Claimant sent, and the Defendant received, a letter entitled “Shepherd Groundworks Ltd Purported Notice of Suspension of Performance of the Works – 9 February 2024”. The Claimant also sent and the Defendant received, a letter entitled "Notice of Termination – Blyth Phase 3, Work Order Ref 11500 (“Work Order”)”.
18. On or around 10 April 2024 the Defendant issued its Application for Payment dated 10 April 2024. On 16 April 2024 the Defendant referred a dispute to adjudication. The decision of the Adjudicator was issued on 29 May 2024.
19. I have had the benefit of reading all of the witness statements contained within the bundles, together with the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments and written submissions on behalf of both parties.
20. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the proceedings. However, I record that I have read and considered the evidence as a whole before coming to my decision.

### **The Law**

21. The parties referred me to a number of cases, legislation and authorities concerning the law in relation to implied terms and the variation of contracts as follows:
  - a. Keating on Construction Contracts (11<sup>th</sup> Edition), 3-070 to 3-078;
  - b. The Unfair Contract Terms Act 1977;
  - c. Construction Law – Julian Bailey (2020) Vol II at paragraph 7.23;
  - d. *Marks and Spencer plc v BNP Paribas Securities Services Trust Company* [2016] AC 742;
  - e. *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20;



- f. *M Harrison & Co (Leeds) Ltd v Leeds City Council* (1980) 14 BLR 118;
- g. *Norwest Holst Construction Ltd v Co-Operative Wholesale Society Ltd* [1998] EWHC (TCC) 339;
- h. *Mannai Investments Company Limited v Eagle Star Life Assurance Company Limited* [1997] AC 749;
- i. *North Midland v Cyden* [2018] EWCA Civ 1744;
- j. *Omak Maritime Ltd v Mamola Challenger* [2010] EWHC 2026 (Comm).

22. The law can be summarised as follows:

- (1) A term can be implied into a contract provided the term which a party seeks to imply is not illegal or contrary to an express term of the contract.
- (2) A term can be implied if it is reasonable and equitable, is necessary to give business efficacy to the contract, is so obvious it goes without saying, is capable of clear expression and does not contradict any express term of the contract.
- (3) The effect of a variation instruction depends on the substance of what is said in the instruction. Variation instructions are not to be read strictly or pedantically.
- (4) The variation must be evident from the document said to constitute a variation instruction.
- (5) An instruction need not contain the word postpone in postponing certain works.
- (6) What is required is that any variation instruction complies with the requirements of the contractual clause for variations.

### **The Issues**

23. The issues to be determined are as follows:

- (1) Is the Claimant's application inappropriate to be decided in Part 8 proceedings?
- (2) Did the email of 24 October 2023 amount to a variation or a cancellation of the Work Order in breach of contract?
- (3) Did the terms of the Work Order preclude an implication of a term preventing the Claimant from postponing the works?
- (4) In any event, if there was a breach of any such implied term, is the Defendant precluded from recovering loss of profit or mobilisation and demobilisation costs as a result of:

- a. the provisions of the Work Order and framework agreement; and/or
- b. the application of compensatory damages limiting the Defendant's recovery to that which could have been recovered under the Work Order?

**Is the Claimant's application inappropriate to be decided in Part 8 proceedings?**

24. The Defendant asserts that there is a substantial dispute of fact in relation to the application because there is conflicting evidence from the witnesses of fact relied upon for this application. Whilst superficially that submission is true, the Claimant agreed all of the additional facts put into the agreed schedule of facts by the Defendant except for paragraph 13. There the Defendant set out that it had undertaken planning, mobilisation and implementation work in relation to the work order from 16 October 2023 after receipt of the Street work permits. On that assertion, the Defendant would have been put to proof.
25. The difficulty with the Defendant's submission is that the single additional nonagreed fact inserted into the otherwise agreed schedule of facts does not affect the determination of the declarations sought by the Claimant. The declarations require interpretation of the contract between the parties. In those circumstances, it is entirely appropriate to deal with the Claimant's application by way of Part 8 proceedings.

**Did the email of 24 October 2023 amount to a variation or a cancellation of the Work Order in breach of contract?**

26. The Defendant relies upon the Adjudicator's decision dated 29 May 2024. In that decision, the Adjudicator determined that the email of 24 October 2023 was not a variation, as defined in the contract but rather was a cancellation of the Work Order.
27. The Adjudicator set out his reasoning on this issue between paragraphs 78 and 86 of his decision. I do not propose to rehearse the whole of those reasons. However, whilst the Adjudicator correctly set out the definition of "Variation" as set out in schedule D

of the framework agreement, he then appears to concentrate on the fact that the definition permitted the Claimants to make “*omissions... in the works*”. He decided that in order to omit the whole of the works, careful wording would be required in any instruction to achieve that objective.

28. His conclusion on the issue is as follows:

“84. However, I do not consider that under the definition of a Variation in this Contract that GCL can cancel the commencement of the whole of the Works, or postpone the commencement of the whole of the Works without clear words which would convey to the reasonable recipient that that is what was intended so that the Contractor would know that the Variation mechanism had been triggered under the Contract.

85. In my opinion, the reasonable recipient of the email issued by GCL on 24th October 2023 (12:13) would not understand that it was being issued either as a Variation to the Work Order, under clause 11.1, or as confirmation of an oral variation to the Work Order, under clause 11.2, for the simple reason that it does not make any mention of the fact that it is being issued either as a Variation, or as a confirmation of any oral variation that may have been given in the telephone conversation held on Monday 23rd October 2023.

86. As it seems to me that GCL’s email seeks to cancel the commencement of the Works under the Work Order and is not labelled in any respect as a Variation I do not consider that it can be interpreted as something that in my opinion it was not intended to be.”

29. Whilst I accept that the email did not specifically state it was a variation, I disagree with the interpretation by the Adjudicator of the definition of “Variation”. The Claimant was entitled to make omissions from a Work Order and also to vary the period in which works were to be performed. The Claimant stated in the email that its intention was to continue with all of the Work Orders which had been signed. The Claimant noted the present position as being that it was unlikely that works would be able to commence before the end of 2023. However, it also stated specifically that it would keep in touch with the Defendant concerning the programme for works.

30. In my judgment, the wording of the contract as agreed between the parties permitted the Claimant to postpone commencement of the works. I accept the submission made by Mr Beaumont that the discussions which all parties agree took place on 23 October followed up by the email on 24 October was all that was required to satisfy clause

11.2 for there to be a variation of the terms and conditions of the Work Order.

**Did the terms of the Work Order allow the implication of a term preventing the Claimant from postponing the works?**

31. In short, no. Whilst this is argued by the Defendant, in my judgment an implied term that the Claimant would not postpone the start of the works would be contrary to express terms within the contract.
32. The Work Order in clauses 8 and 9 (concerning commencement and completion) and 11 (concerning variations) provides machinery to allow variations of time. I accept the submission made by the Claimant that the Work Order provides the machinery to permit commencement to be postponed. I further accept the Claimant's submissions that the Work Order operates without the need to imply the term suggested and that it cannot be said that the suggested term "goes without saying". Further, I accept the submission that as the contract provides machinery for time variations being made by the Claimant, the proposed implied term would contradict express terms of the contract if permitted.
33. I do not accept the submission made by the Defendant that implication of the term would be required to give business efficacy to the agreement. The parties could have agreed a specific term that the Claimant would not postpone commencement of work required by any Work Order. They did not do so.
34. As was set out in the witness statement of Peter Shepherd, the signing of a Work Order did not mean that work could commence by the Defendant immediately. Commencement of the work would depend on the date when the relevant local authority would permit physical work to begin on site. In those circumstances, I accept the submission made by Mr Beaumont for the Claimant that the parties had anticipated that there may be delays and as such agreed the mechanics for varying the

period when the works were to be done. I further accept the submission of Mr Beaumont that there was some advantage also to the Defendant in the variation provisions. If no variation of time was permitted the Defendant would remain under an obligation to complete all of the work within 14 weeks. That would be the position regardless of when the relevant local authority in fact permitted physical work to begin on site.

**In any event, if there was a breach of any such implied term, is the Defendant precluded from recovering loss of profit or mobilisation and demobilisation costs as a result of:**

- a. the provisions of the work order and framework agreement; and/or**  
**b. the application of compensatory damages limiting the Defendant's recovery to that which could have been recovered under the Work Order?**

35. I have found above that there was a variation, no term is to be implied and as such there is no breach of any implied term. If I am wrong about that, I also reject the Defendant's submissions concerning the recovery of loss of profit, mobilisation and demobilisation costs.
36. Prices had been agreed between the parties in respect of individual units and on a price per plot basis. The maximum amounts payable if one contractor undertook and completed all of the work in all of the plots would be £209,956.46. That unit pricing would include profit and all mobilisation and demobilisation costs.
37. Whilst I accept that there is nothing in the contract which precludes the Defendant's right to recover damages at common law, I accept the submission of the Claimant that a party cannot do better than if the contract had been performed if damages are awarded at common law. What is payable to the Defendant in the event that a Work Order is terminated is set out in clause 18. That clause provides that the employer shall not be liable for costs, loss of profits or any indirect or consequential losses. What the Defendant could have done if its employment was terminated in respect of any individual Work Order was to claim any sums "properly due... in connection with the carrying out of the works in connection with the termination of this Work Order".

38. The Defendant asserts that clause 3.3 does not exclude recovery at common law of loss and expenses actually incurred and if it did exclude those losses, the term would fall foul of the Unfair Contract Terms Act 1977. On this point, I accept the submissions made by Mr Beaumont for the Claimant. In my judgment, the clause is reasonable having regard to the bargaining position of the parties, the opportunity to enter into an alternative agreement, whether the Defendant knew or ought to have known of the existence of the term, the clause as a whole, consent to the clause and the limit of liability.
39. Mr Shepherd had been the managing director of the Defendant since February 2015. He had entered into 68 similar Work Orders with the Claimant under the same framework agreement. The Defendant did not have to contract with the Claimant. It could have declined a specific Work Order. However, the Defendant had the benefit of being potentially provided with work pursuant to the framework agreement. The Work Order provided mechanisms to extend time and, if a contract was terminated, for there to be payment for the works done before termination.

### **Conclusion**

40. For all of the reasons previously given, I make the declarations as sought by the Claimant in the following terms:
- a. That the Claimant is not and was not in breach of the terms of the Blyth Work Order, or the Framework Agreement by informing the Defendant of the postponement of the Blyth Phase 3 works via its email from Richard Cameron to Peter Shepherd, dated 24 October 2023.
  - b. To the extent the Claimant is in breach in respect of declaration a. above, the Claimant is not liable to the Defendant for the mobilisation, demobilisation or loss of profit allegedly suffered by the Defendant under the Blyth Work Order, or the Framework Agreement.