

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
TECHNOLOGY AND CONSTRUCTION COURT (KBD)  
[2024] EWHC 3204 (TCC)

Case No. HT-2022-000091

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London  
EC4A 1NL

Tuesday, 23<sup>rd</sup> July 2024

Before:

THE HONOURABLE MRS JUSTICE JEFFORD

B E T W E E N:

~~REACTION ENGINES LIMITED~~

and

1. BNP PARIBAS DEPOSITORY SERVICES (JERSEY) LIMITED (FORMERLY  
BNP PARIBAS SECURITIES SERVICES TRUST COMPANY (JERSEY)  
LIMITED)

2. BNP PARIBAS DEPOSITORY SERVICES LIMITED (FORMERLY BNP  
PARIBAS SECURITIES SERVICES TRUST COMPANY LIMITED)

Defendants / Part 20 Claimants

-and-

A&H CONSTRUCTION AND DEVELOPMENTS PLC

Third party

-and-

MICHAEL BRADBROOK CONSULTANTS LIMITED

Fourth party

-and-

FEASIBILITY LIMITED

Fifth party

MS S HANNAFORD KC & MS R O'HAGAN appeared on behalf of the First and Second  
Defendants

MR V MORAN KC & MR H SMITH appeared on behalf of the Third Party

MR T CRANGLE appeared on behalf of the Fourth Party

MS S MIRCHANDANI KC appeared on behalf of the Fifth Party

JUDGMENT  
(Approved)

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MRS JUSTICE JEFFORD:

1. This is supposed to be a costs and case management conference but it has not got to that yet. However, the first issue on that costs and case management conference is whether there should be an order for the hearing of preliminary issues. That application is made by Mr Moran KC on behalf of A & H Construction. Mr Crangle for Bradbrook is neutral but the application is vigorously opposed by Ms Hannaford KC for the Trust and Ms Mirchandani for Feasibility.
2. The two preliminary issues which were the subject matter of the application were framed as follows:
  - a. Issue no 1: whether the effect of the October 2018 Practical Completion Statement is that practical completion is deemed for all purposes under the Design and Build Contract to have occurred on 18 October 2018.
  - b. Issue no 2: whether the third party's Mr Mottram and fifth party's Mr Flavell, that is representing A & H and Feasibility respectively, had agreed orally by telephone in about November 2018 that the October 2018 PC Statement would be treated as a partial possession or sectional completion certificate and that overall completion would be granted when any outstanding works had been completed. In addition, if so, what is the legal effect of that agreement (if any)?
3. In light of the Amended Reply, a further preliminary issue was identified in an email this morning, issue no. 3. It is alleged, at paragraph 6(2) of the Trust's Amended Reply, that A & H was estopped from relying upon the 19 October 2018 document provided as a valid certificate for the purposes of clause 2.27 of the Design and Build Contract. That gives rise to the third proposed preliminary issue.
4. I intend to explain the reasons for my decision relatively briefly bearing in mind that it is now 4.55pm. I start by saying that my decision is that there should not be a hearing of the preliminary issues that are sought. I have been reminded of the provisions of Section 8 of the TCC Guide and the relevant law, in particular, the decision in *McLoughlin v Grovers* [2001] EWCA Civ 743 and the decision in *Midal Cables Limited v AMEC Foster Wheeler Group Limited* [2019] EWHC 1155 (TCC), applying the principles in *McLoughlin v Grovers*. I bear those principles in mind but I am not, in the interests of time, going to set them out or address them item by item.
5. The first issue - although, as Ms Mirchandani KC pointed out, it does not refer to clause 2.27 of the contract - is, in fact, dependent on the terms of clause 2.27. As Mr Moran KC has explained it in the course of his submissions, his position is, and the issue is intended to capture A & H's case that, the effect of the certificate, which appears to have been issued in October 2018 and was sent under cover of an email of 19 October 2018, is that, for all purposes of the Design and Build Contract, practical completion was deemed to have occurred on 18 October 2018. That presupposes two things. The first is that the document that was sent under cover of the email of 19 October 2018 from Feasibility to A & H was, in fact, or was intended to be, a Certificate of Practical Completion. The second is that once it was issued and sent in that manner, on a proper construction of clause 2.27, it was binding on the parties and there is no prospect of the Trust opening up the certificate in the course of

these proceedings. For varying reasons, the Trust and Feasibility submit that both of those propositions are wrong.

6. The first of them, that is whether this was, in fact, a Certificate of Practical Completion, might seem to be answered by the document itself but it is entirely clear from Feasibility's Defence and the chronology annexed thereto that there is, at the very least, a factual issue as to the circumstances in which that document was sent to A & H and what it was intended to be.
7. Mr Moran KC's submission is that that investigation is encompassed within the terms of preliminary issue no. 1 and that it involves a relatively limited factual investigation. I have significant reservations as to whether that submission is correct.
8. The events surrounding the issue of the certificate in October 2018 may appear to be of relatively limited compass and could be dealt with at a preliminary issues hearing. However, the more significant point is that both the Trust and Feasibility say, and I am putting this in general terms, that, after the sending of this certificate, nobody, including A & H, conducted themselves as if practical completion had, in fact, been achieved. That is relied upon, as I understand it having put the point a number of times in the course of argument, as evidencing or supporting what is said by the Trust and Feasibility about what was happening in October 2018 and why something that looked like a Certificate of Practical Completion was issued. That involves consideration of the progress of the works throughout 2019 and into 2020 when a Practical Completion Certificate was issued and, on A & H's case, issued again.
9. The answer to that from A & H, in terms of the evidential scope of the proposed preliminary issue, is that much of what happened in that period is not controversial. They did continue to carry out works. They did continue to remedy works. Some of the specific points which have been raised by the Trust and Feasibility, for example, as to insurances and retentions can be easily dealt with and any factual investigation of what happened subsequently is likely to involve relatively uncontroversial facts with the real issue being what inferences are to be drawn from the manner in which the parties conducted themselves.
10. There is an obvious attraction in that argument as it is put by Mr Moran KC but I am persuaded by Ms Hannaford KC and Ms Mirchandani KC that it is a faint hope that there will not, in fact, be any significant dispute about what happened subsequently, not necessarily in terms of what A & H actually did but, as Ms Hannaford KC put it, why they were doing it. It is, therefore, likely that any witnesses called will be cross-examined as to the underlying motivation for their conduct and the approach that they took to the apparent certification of practical completion in October 2018. It, therefore, seems to me that, simply in terms of the scope of factual evidence, even issue no 1 does not cry out to be dealt with as a preliminary issue and it is likely, if dealt with as a preliminary issue, to lead to the carving out of certain areas of factual consideration and the risk of inconsistent findings of fact.
11. The second element of the argument is the argument that the deeming provision has the effect that the certificate, once sent, renders it unnecessary to determine whether practical completion had, in fact, been achieved. In other words, as I have put it before, whether it rendered the opening up of the certificate unavailable to the Trust.

12. It would be wrong for me to decide that issue of construction of clause 2.27 on this application for the hearing of a preliminary issue of which that particular matter would be a part. However, as Ms Hannaford KC submitted, Mr Moran KC places particular weight on the likelihood of a positive outcome for A & H in respect of that argument. For that, he relies on the decision of O'Farrell J in the case of *Swansea Stadium Management v Interserve Construction* [2018] EWHC 2912 (TCC). However, the terms of the clause in this standard form contract and the clause in issue in the *Swansea Stadium* case were significantly different. In that case, the opinion of the Employer was the first step in the establishing of practical completion. The next step was the issuing of a statement and the last step, so to speak, was the deeming of that statement to be a decision as to practical completion under the terms of the contract. On that basis the driver, if one likes, of the clause was the opinion of the Employer. Without going into the detail of the decision O'Farrell J, she decided that the opinion of the Employer could not be opened up subsequently so that the deeming provision had a conclusive effect.
13. In the present case, on the face of the clause, there has to be, first, an objective assessment as to whether practical completion has been achieved and whether various other clauses have been complied with before a statement to that effect is issued and before the deeming provision comes into play.
14. In those circumstances, and Mr Moran KC accepts that this clause is not the same, there is no particular strength in the argument that he is likely to succeed in his submission on a preliminary issue hearing. That is not a decision on the proper construction of the clause or a case of me pre-empting the outcome. However, as Ms Hannaford KC put it when I asked her what relevance I should attach to this, it is not a point in A & H's favour.
15. I take it no further than that but it does not seem to me that the arguments on construction of the clause are ones which indicate that it would be particularly helpful to order preliminary issue no 1 to be heard as a separate preliminary issue.
16. The second proposed preliminary issue as identified also involves a factual consideration. Again, it involves, on its face, a fairly limited scope of factual enquiry but potentially brings into play the same issues as to what happened over the duration of the works continuing on site.
17. The estoppel argument, which I have proceeded on the basis will be part of the Re-Amended Reply, raises the same scope of factual investigation as to what happened in 2019 and 2020 and raises the same points.
18. In short and for those reasons, it seems to me that these proposed preliminary issues, leaving aside any question of what cost they would add to the overall litigation and what delay they may cause within the scope of the litigation, are not suitable for determination as preliminary issues. There is a real risk, as Ms Hannaford KC put it, of adopting "a treacherous shortcut" so that, if ordered, even with the proposed three to four day hearing, the scope of the issues and the scope of the factual investigation would both expand - and expand into areas which will subsequently be the subject matter of the full trial. Further, as has been submitted, Mr Moran KC would have to succeed on all three issues in order for the scope of the main trial in any sense to be reduced. That, again, reduces the likelihood of the outcome of the hearing of preliminary issues being one which significantly reduces the

scope of the main trial and the evidence to be adduced and interrogated. I need say no more than that.

**End of Judgment.**

Transcript of a recording by Acolad UK Ltd  
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This transcript has been approved by the judge.