Neutral Citation Number: [2024] EWHC 3417 (TCC)

Case No: HT-2024-MAN-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHSTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil and Family Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date of hearing: 5 November 2024

Before:

HIS HONOUR JUDGE STEPHEN DAVIES SITTING AS A HIGH COURT JUDGE

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Between:

IES UTILITIES GROUP LIMITED	**Claimant**
- and -	
BRITISH TELECOMMUNICATIONS PLC	**Defendant**

- -
- -

MR DAVID FEARON (**Direct access**) for the **Claimant**
MS JENNIFER WILD (instructed by **DWF Law LLP**) for the **Defendant**

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APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE STEPHEN DAVIES:

1. The issue for determination is whether or not this case should continue as a Part 8 claim, as the claimant contends, and, if so, on what basis, or whether it should be directed to proceed as a Part 7 claim, as the defendant contends. I have had the benefit of reading the Part 8 claim, the correspondence exchanged by the parties as to its appropriateness, the witness statements produced on behalf of the parties and the very helpful written and oral submissions of counsel for the claimant and the defendant respectively.

2. The relevant principles as to the use of the Part 8 procedure, particularly in the context of construction disputes, are helpfully set out in a number of earlier decisions. I referred to some of them in my recent decision in *Workman Properties Ltd v ADI Building and Refurbishment Ltd* [2024] EWHC 2627 TCC, to which Ms Wild in her helpful written note referred me, as well as to the earlier authorities, which set out the general principles by reference both to Part 8 itself and to the way in which the courts have given guidance as to how questions of suitability in relation to Part 8 claims seeking declaratory relief should be determined. These are (in chronological order): (*ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 at [77-78]; *Merit Holdings Ltd v Michael J Lonsdale Ltd* (2017) 174 Con LR 92; *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm) at [78]; *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2020] 1 All ER (Comm) 265 at [42]; *A & V Building Solution Ltd v J&B Hopkins Ltd* (2023) 206 ConLR 184 at [34], [38], [42-43]; *Berkeley Homes (South East London) Ltd v John Sisk & Son Ltd* (2023) 210 Con LR 43 at [14]); *TClarke Contracting Ltd v Bell Build Ltd* [2024] EWHC 992 (TCC) at [20] There is no need for me to recite what is said in these authorities in this oral judgment. It can be taken as read.

3. The starting point is a brief summary of the chronology, but again I do not need to go into any great detail. That would be unnecessary. It suffices to say that in September 2022 the parties entered into a supplier agreement whereby the claimant agreed to provide services for the defendant which related, as I understand it, to refurbishing telephone poles in various areas across the country. There were two separate agreements, a supply agreement and a purchase agreement, which were intended to, and did, dovetail together. The first is a detailed and lengthy document, containing 59 clauses and eight schedules, on BT's standard form. The purchase agreement is a less lengthy and detailed document, but intended to apply in tandem with the supply agreement.

4. Things worked well for some time. An amendment agreement was entered into, but eventually, because the parties were unable to agree commercial terms moving the contract from a day rate payment contract to a more bespoke synthetic rates contract, the defendant exercised what it contends was its contractual right to terminate. It appears that the relationship did not immediately break down but, eventually it did. In July 2024 the claimant instituted adjudication proceedings, contending that the defendant's conduct amounted to a repudiation of the contract and claiming very substantial sums, in the region of £10 million, on the basis that it had a guaranteed right to payment for the full provision of the full number of poling gangs for the full term of the agreement.

5. The adjudication was fully contested with substantial statements of case, documents and witness statements. By his decision made on 30th August 2024 the adjudicator

found entirely against the claimant and also ordered that the claimant should pay the costs of the adjudication.

6. The claim form in this case was issued on 27th September 2024 and in it the claimant sought three declarations. The defendant makes the point, and it is true, that in the details of the claim the claimant was also seeking what was described as a final determination of a number of matters decided by the adjudicator. The defendant has identified some 17 or 18 separate issues in dispute. Whether or not this is strictly speaking what the claimant is seeking as well as the three declarations it is unnecessary for me to decide. As Mr Fearon for the claimant has realistically and sensibly accepted, at the very least these are staging points along the way to deciding the three declarations sought.

7. The first declaration is whether on a proper interpretation of the terms of the agreement the claimant was to supply and employ, directly or indirectly, a minimum number of teams for the duration of the contract, for the duration of the PA minimum term or until the contract was terminated in accordance with the agreement, and the defendant was contractually obliged to renumerate the claimant for all poling teams it employed irrespective of if or how the defendant instructed that they be deployed during the subsisting contract period. That is obviously on its face a question purely of the proper interpretation of the contract and I will come back to that in a moment.

8. The second declaration sought is that the defendant repudiated the contract on 13th July 2023 by not terminating the contract in accordance with the provisions in the contract governing termination of the agreement. That again, on the face of it, might be said to be purely a question of construction of the relevant notices, comparing what was done with the way in which the contract required termination to be effected.

9. However, as Miss Wild has submitted, in fact this raises at least two further questions.

10. Firstly, whether or not the history of the operation of the contract from the contract start date down to 13th July was such that the conduct of the defendant can be seen as repudiatory in all of the circumstances, which is a fact sensitive question.

11. Secondly, even though the declaration as drafted does not include a declaration to the effect that the claimant accepted that repudiation on a specific date, whether that occurred. As is often said in this context, an unaccepted repudiation is a thing writ in water. It follows that it must be accepted by the innocent party.

12. This point leads into declaration 3, where the claimant seeks a declaration that it is entitled to recover damages from the defendant as a consequence of the defendant's repudiatory breach. That would only follow if there had been a valid acceptance prior to any previous affirmation of the contract. This is a fact sensitive question.

13. It is true that the claimant is not seeking to invite the court to assess those damages, simply to declare that there is an entitlement to recover damages albeit, as Miss Wild says, would follow anyway if in fact there had been a repudiation and a valid and effective acceptance.

14. The claimant did not serve any evidence with the claim form, whether documentary or in the form of witness evidence. That is notwithstanding that in the adjudication it put

in witness statements which included evidence as to the circumstances in which the contract was entered into and other relevant circumstances, with a view to seeking to persuade the adjudicator of the merits of the claimant's case on the question of contract interpretation. That has led the defendant to argue in response that there is a substantial, or at least potentially a substantial, amount of factual evidence relevant to the question of contractual construction which it would also seek to adduce in these Part 8 proceedings and which, in accordance with the principles to which I have referred, would make the Part 8 procedure unsuitable.

15. It seems to me that it is unlikely, based on what I have seen so far, that any of the evidence adduced by the claimant in the adjudication and potentially sought to be adduced by the defendant in these Part 8 proceedings would meet the test of being relevant and admissible evidence as part of the relevant factual matrix, but the difficulty which the court has at this stage is that there is no clarity about this point. That is because the claimant has not set out thus far, with the sort of clarity one would expect to find in a properly pleaded statement of case, exactly what its case is as to contractual construction. In particular whether it is, as Mr Fearon has said today, purely a case within the four corners of the contract, or whether there are relevant factual matrix matters upon which it would seek to rely. For example, it has been observed during the course of this hearing that evidence has been adduced in relation to the way in which the contract was operated, in terms of invoicing and payment, and also in relation to the terms of the amendment agreement which, it has been said, might throw some light on the interpretation of the contract. At the moment it seems to me that unlikely that evidence of either could be relevant, based on standard principles of contract interpretation, but it might equally be said that there was a variation or an estoppel and that, of course, would throw up potentially disputed questions of fact.

16. So the end result, it seems to me, in relation to issue 1 is that at least potentially, and possibly quite likely, it could really be a question of pure contract interpretation with little, if any, relevant factual matrix and little, if any, factual dispute. However, at present, the court does not know for sure.

17. It follows that there are two alternatives which I have identified.

18. The first is to require the claimant to reformulate its Part 8 case so as to make it clear that what Mr Fearon has said is the position is indeed the position. If that is the case and if the defendant is not able, as at the moment it seems to me it is not, to identify for itself any other relevant disputed factual material, the court could potentially go on to determine that issue in a Part 8 claim.

19. The alternative is to plead the whole case out in a Part 7 claim with a fully pleaded Particulars of Claim, including pleading its case on contract interpretation, in accordance with the guidance in the Commercial Court Guide, which is more detailed on this point than the guidance in the TCC Guide, based no doubt on the bitter experience of the Commercial Court in being overwhelmed with evidence alleged to be part of the factual matrix, with the defendant to respond in the same way, and if at that point it is apparent that this is a paradigm case for a preliminary issue on contract interpretation, making an order in those terms.

20. That still leaves the question as to what to do about the remaining declarations. It is obvious from what I have already said, and although Mr Fearon did not formally

concede as much I think he sensibly recognised this, that it is realistically inappropriate for those declarations to go forward for determination in a Part 8 claim, because they quite clearly raise factual issues which are likely to be contested. Again, therefore, I return to the narrow question, which is whether or not the better course is to require a proper pleading out under Part 7 or to allow the claimant the opportunity to amend.

21. Miss Wild made a number of points in relation to that. In particular, she submitted that it was far better that the court should make these determinations based on properly pleaded statements of case, rather than take the risk of making determinations without that exercise having been conducted and, if necessary, without the opportunity of identifying relevant documentary evidence and/or relevant witness evidence. She particularly emphasised the fact that this is a BT standard form contract, of which there are a number in use at present, where the defendant has always formed the view that the claimant's interpretation is not the right interpretation and not the way it has operated these agreements. Accordingly, she argued, there is a risk of the court making a finding adverse to its case without a proper investigation, which would potentially have very significant commercial consequences.

22. I also should remind myself of what I said in the *Workman Properties* case, where I referred to the observation of Eyre J in *Solutions 4 North Tyneside Ltd v Galliford Try Building* [2014] EWHC 2372 (TCC) at paragraph 76, where he identified the need for caution in granting declarations in Part 8 proceedings where no substantive claims are made, because the judge does not have the benefit of seeing how the competing cases advanced by the parties work out against the actual claims in play.

23. Miss Wild also submitted that even if the court did make a determination on contract interpretation in Part 8 proceedings, that would not resolve the issue. The substantive claim would still have to be fully pleaded out or fully articulated at some point and, if it was not settled, then there would have to be Part 7 proceedings anyway, so that there is little to be gained in hiving off this preliminary question to be determined as a Part 8 claim. In that respect she also submitted that there is no evidence to show, for example, that the claimant lacks sufficient means to finance this claim if it was made in a traditional way, bearing in mind the significant value of the claim on the claimant's case.

24. In my judgment the court has to exercise caution in this sort of case and resist the temptation to say that everything else can be brushed aside and the court simply direct that this is purely a straightforward interpretation of a contract case with no relevant material other than the contract, and the parties and the court should simply get on with it and do it quickly and cheaply. That would in my judgment involve sanctioning an abuse of the Part 8 proceedings, which cannot be justified in this case. The safer course, it seems to me, is to direct that the Part 7 procedure should apply and the case should be fully pleaded out, so that if it does become clear that it is suitable for a preliminary issue then it can be ordered and tried in that way.

25. Whilst I recognise that that is going to involve time and money for the claimant, it is a substantial claim, it was not dealt with in accordance with the relevant principles from the start, in that there was no attempt to liaise and engage and seek to identify whether it was suitable for Part 8, and the fact that it has been very much put forward as a straightforward re-run of the adjudication has not helped the claimant's case. I am

satisfied that it would be wrong to ignore all of these factors and to allow it to be continued as a Part 8 claim.

26. For all of those reasons I accept the defendant's arguments and direct that the case shall proceed as a Pt7 claim.

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(This Judgment has been approved by HHJ Davies.)