



Neutral Citation Number: [2018] EWHC 3230 (TCC)

Case No: HT-2018-000169

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT

7 Rolls Building
Fetter Lane, London. EC4A 1NL

Date: 11th December 2018

Before :

HIS HONOUR JUDGE MCKENNA

Between :

University of Warwick	<u>Claimant</u>
- and -	
Balfour Beatty Group Limited	<u>Defendant</u>

Mr Vincent Moran QC (instructed by **Wright Hassall LLP Solicitors**) for the **Claimant**
Mr Adam Constable QC (instructed by **Pinsent Masons LLP Solicitors**) for the **Defendant**

Hearing date:
1st November 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ McKenna:

INTRODUCTION

1. The University of Warwick, the Claimant, is a university located in Coventry and is the Employer whilst Balfour Beatty Group Limited, the Defendant, is a company which carries on business as a building contractor and is the Contractor under a JCT 2011 Design and Build form of Contract with bespoke negotiated amendments which is the subject matter of these proceedings ('the Contract').

2. The Contract relates to a project to design and build the National Automotive Innovation Centre ('NAIC') on the Claimant's campus, the intention of which was to provide an international class automotive academic and commercial R & D research facility.

3. This claim raises a short point on the construction of the Contract and, in particular, whether, on the proper construction of the definition of Practical Completion within the Contract, the entire Works were to be complete before a single Section could be certified as complete. There is also a related dispute as to whether, as a consequence of the proper meaning of Practical Completion, the liquidated damages provisions are rendered inoperable.

THE CONTRACT

4. The Contract Particulars provide for the Works to be divided into Sections which are defined as follows:

‘Section of works identified in the Employer’s Requirements’;

Section 1 – *Main Equipment Room’s and Sub Equipment Room’s as defined on Cullinan Studio drawings NAIC-L800 series*

Section 2 – *Dynamometer build and test area as defined on Cullinan Studio drawings NAIC-L800 series*

Section 3 – *Café area as defined on Cullinan Studio drawings NAIC-L800 series*

Section 4 – *all other works”*

5. The Date for Possession for each Section was 20th April 2015 whilst the Date for Completion for Sections 1-3 is 10th April 2017 and for Section 4 was 5th July 2017.

6. There is also provision for different liquidated damages figures to apply for each Section as follows:

“Sections; range of liquidated damages for each Section”

Section 1: *£5,000 per week or pro-rotta for any part thereof*

Section 2: *£15,000 per week or pro-rotta for any part thereof*

Section 3: *£10,000 per week or pro-rotta for any part thereof*

Section 4: *£65,000 per week or pro-rotta for any part thereof”*

7. By clause 1.1 of the Contract (as amended):

Practical Completion is defined as follows:

“Practical Completion”: a stage of completeness of the Works or a Section which allows the Property to be occupied or used and in which:

- (a) *there are no apparent deficiencies or defects and no incomplete items of work which would or could:*
 - (i) *compromise the health and safety of persons entering and/or occupying the Property;*
 - (ii) *given their cumulative number and/or nature, have more than a trivial impact on the beneficial occupation and use of the Property for the intended purpose, by reason of their rectification or completion; and/or*
 - (iii) *in relation to the work necessary to remedy them will cause interference or disruption to the beneficial use or occupation of the Property;*
- (b) *the Site has been substantially cleared of all temporary buildings, builders’ plant and equipment, unused materials and rubbish and cleaned;*
- (c) *any other stipulations or requirements which the Contract Documents indicate are to be complied with before Practical Completion have been complied with to the reasonable satisfaction of the Employer.*
- (d) *the relevant Statutory Requirements have been complied with and any necessary consents or approvals obtained;*
- (e) *all parts of the Works or services in a Section are fully functioning, and safe access to the Section (and associated plant areas required to operate the Section) through or around any other uncompleted sections can be secured on behalf of the Employer or any Tenant (including their contractors, sub-contractors, consultants, sub-consultants, suppliers and agents) in accordance with the access provisions set out in the relevant section of the Employer’s Requirements;*
- (f) *full testing and commissioning of the services installations has been completed satisfactorily and/or such testing or commissioning has included:*
 - 1. *Complete testing and proving of all systems and equipment with the provision of all certification to the Employer;*
 - 2. *Regulation of all air and*

3. *Completion of the Building Management System and Controls as follows:*
- (i) *All equipment in position with all wiring complete and satisfactorily tested*
 - (ii) *Point to point testing complete and satisfactorily certified;*
 - (iii) *All sensors calibrated and satisfactorily certified;*
 - (iv) *Functioning testing (software debugging) – fully complete, tested and satisfactorily certified;*
 - (v) *BMS Supervisor and Graphics – fully complete, tested and satisfactorily certified;*
 - (vi) *Fine tuning of control loops – substantially complete; and*

provided always that where the Contract Documents expressly state that the commissioning, testing and/or adjustment of any mechanical or electrical services installations forming part of the Works is to be completed before Practical Completion of the Works is to be regarded for the purposes of this Contract as achieved, then the Works shall not be considered to have achieved Practical Completion for the purposes of this Contract until such commissioning testing and/or adjustment is completed as the Contract Documents require and the relevant certificates issued.

Property is defined as:

*“**Property**”: the property comprised of the completed Works.”*

Works is defined as [and slightly differently to that at the First Recital]:

*“**Works**”: the works briefly described in the First Recital, as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with this Contract.”*

8. Clause 2.27.1 (as amended) provides as follows:

“Practical Completion

2.27 When Practical Completion of the Works or a Section is achieved and the Contractor has sufficiently complied with clause 2.37 and 3.16.5, then:

- 1. in the case of the Works, the Employer shall forthwith issue a statement to that effect (‘the Practical Completion Statement’) and the Employer shall from such date be entitled to enter and take possession of the completed Works with effect from such date;*
- 2. in the case of a Section, he shall forthwith issue a statement of Practical Completion of that Section (a ‘Section Completion Statement’); and Practical Completion of the Works of the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that statement.”*

9. Clause 2.29 provides a mechanism whereby the Claimant is entitled to liquidated damages in the event that the Works or a Section do not attain Practical Completion by the relevant completion date.

10. The Employer’s Requirements provide as follows in respect of completion of individual Sections:

- i) At paragraph 1.10 of the Project Overview:

“SECTIONAL COMPLETION

1.10 There will be a requirement for Sectional Completion, of various areas of the building as defined within Volume 4, to facilitate the installation of equipment. The Tender is to advise as part of the Tender return the dates on which these areas will be complete. The

Contractor's attention is directed to the requirements associated with the provision of these Sectional Completions..."

- ii) At paragraph 54 of Section A13 Description of the Works it is provided as follows:

"SECTIONS OF THE SITE FOR COMPLETION AND HANDOVERS

The Contractor is attention is drawn to the requirements of Sectional Completion, early access and coordination included in Volume 4...."

- iii) At paragraph 160 of A32 of the Project Particulars it is provided as follows:

"160 PARTIAL POSSESSION / SECTIONAL COMPLETION BY EMPLOYER

Practical Completion (Section and final) and Handover Procedures
The Employer intends to achieve a completely defect-free (at the discretion of the Employer) and fully documented Completion of each section of the project which, on handover, will not require any further attention from the Contractor, other than to rectify faults that might occur or become manifest after Practical Completion of the section and the Practical Completion of the whole of the project....

Section(s) of the Works shall be handed over in accordance with the outline programme and the Sectional Completions as set out in Clause A13 and Volume 4 of the Employer's Requirements....

Requirements for Practical Completion of a Section

For Practical Completion of a Sectional [sic] the whole of the works in that Section are to be completed and cleaned, with all services in a Section being fully functional and with safe and secure access/egress to the defined Sectional Area through or around other uncompleted Sections/areas of the works."

EVIDENCE

11. The Claimant relies on two witness statements from Jennifer Greenway, the Claimant's Director of Corporate Finance whilst the Defendant relies on a statement from its Operations Director, Michael Thompson. Although of some interest by way of background and for context, the evidence does not really assist the Court with what is in effect an issue of pure construction.

THE ADJUDICATION

12. It is the Defendant's case that on a proper construction of the relevant provisions of the Contract, it is not possible to achieve completion of one Section of the Works prior to completion of the whole of the Works, as a result, the liquidated damages provisions of the Contract were inoperable. As a result, by a Notice Adjudication dated 19th March 2018, the Defendant commenced an Adjudication on this construction point.

13. The Adjudicator, Simon McKenny, in his Decision dated 2nd May 2018 accepted the submissions made to him on behalf of the Defendant and concluded as follows on a proper construction of the relevant provisions of the Contract and in particular, of the defined phase Practical Completion and the word 'Property':

“27. I decide that Balfour Beatty are entitled to the declaration that they seek in this adjudication. I accept Balfour Beatty's assertion that the ordinary and natural meaning of the words used in the definition of Practical

Completion means that it is not possible to achieve Practical Completion of any Section in isolation from the other Sections”

14. Having set out the definition of Practical Completion he continued as follows:

“28. Given the above definition, the only time of which the property comprised of the completed National Automotive Innovation Centre could be occupied and used is when all Sections have achieved Practical Completion. Clearly for the development to be complete requires all four Sections of the Works to achieve Practical Completion. In view of this clear definition it is not possible to achieve Practical Completion of any Section in isolation from the other Sections. I do not consider that it is possible (and or appropriate) to read anything else into the words that have been used.

31. “The words used in the definition of Practical Completion therefore stipulates that an individual Section only achieves Practical Completion at a stage of completeness which allows the completed Works to be occupied and used. By referring to the completed Works I consider this indicates that all Sections must achieve Practical Completion for any Section to meet the definition of Practical Completion included in the Contract. This definition on the face of it may seem illogical however the words used by the parties are clear and unambiguous. Other than applying this literal interpretation I am unable to determine any alternative definition of Practical Completion from the words used by the parties.”

THE APPLICABLE LAW

15. There is no issue between the parties as to the applicable law regarding the approach to construction of a contract and a useful exposition can be found in the speech of Lord Neuberger PSC in *Arnold – v – Britton* [2015] AC1619 as follows:

*“15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.*

16. For present purposes, I think it is important to emphasise seven factors.

*17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.*

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the

worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

*19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have

intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

*23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case."*

16. In summary, the Court is concerned to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the Contract to mean, and it does so by focussing on the meaning of the relevant words, that is to say, what the parties are taken to mean by using the words in question.
17. It is important to bear in mind, however, as was submitted on the Defendant's behalf, that the purpose of interpretation is to identify what the parties have agreed and not what the Court thinks that they should have agreed. Where the parties have used unambiguous language the Court must apply it and not ignore the words used or import words not used so as to achieve what the Court divined to be the parties' real intention.

THE PROPER CONSTRUCTION OF THE CONTRACT

18. To my mind, the interpretation contended for on behalf of the Defendant, and accepted by the Adjudicator, does not accord with the ordinary meaning of the words used. It overly focuses on the meaning of the one word 'Property' at the expense of what the parties plainly meant by using all the words and without regard to the wider context of the other provisions of the Contract and the background known to both parties at the date that they entered into the Contract.
19. In particular, as I have recorded, the Contract Particulars provide for different Completion Dates for Sections 1-3 and Section 4 respectively and there are different rates of liquidated damages for each of Sections 1-4 of the Works. These facts reveal a clear intention to permit completion of one or more Sections before completion of the Works as a whole, and, it goes without saying that of course there would be no purpose in treating the Sections separately if Practical Completion of each could only be achieved when the Works as a whole were complete.
20. As it seems to me, properly construed, the ordinary meaning of the words used in clause 2.27 both when considered in isolation and in the context of the Contract as a whole is that a Section attains Practical Completion if it is sufficiently complete that it would permit or allow the use and occupation of the Property and sub paragraphs (a) to (f) of the definition are satisfied in so far as they are related to or impact upon the Works connected with the particular Section under consideration and it is not necessary for the Works

as a whole to be complete or the Property as a whole to be ready for occupation. The use of the word ‘allows’ strongly suggests that the relevant stage of completeness to achieve completion of the given Section need not be the complete Works but something less which permits or enables such a final stage of completion to be achieved in due course. In addition, the use of the words “the Works or a Section” in clause 2.27 and in the definition of Practical Completion suggests that they are alternatives and not intrinsically linked. To my mind, this is not a case of giving effect to an apparent intention notwithstanding rather than because of the actual words used. Rather it reflects the ordinary meaning of the language used in clause 2.27 and the definition of Practical Completion as well as reflecting the parties’ clear intention, as reflected elsewhere in the Contract to introduce a Sectional Completion regime, the provisions in respect of which would be rendered otiose on the Defendant’s analysis.

21. Even if I were to be wrong about the absence of any ambiguity in the meaning of the words used, then plainly, in my judgment, business common sense supports the construction advocated for by the Claimant since otherwise there would have been no point in providing for the Sectional Completion regime at all.
22. In the light of my conclusion on the construction point there is no need for me to go on to consider the arguments put forward by the Defendant that the mechanism had become inoperable or penal because the damages would no longer represent damages for breach, an argument which, it has to be said, was not pleaded and was only really developed in the Defendant’s skeleton

argument. Had it been necessary to decide the point I would have had no hesitation in concluding that the relevant provisions were in fact operable, essentially, for the reasons advanced on the Claimant's behalf in its supplementary skeleton argument.

DISPOSAL

23. It follows in my judgment that the Claimant is entitled to a declaration in the terms sought.
24. I trust that the parties will be able to agree the terms of an order including costs which reflects the substance of this judgment.
25. Finally, I would like to take this opportunity to thank both Counsel for their assistance with this case.