Neutral Citation Number: [2018] EWHC 2875 (QB)

Case No: HT/2018/000219

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2018

**Before** :

**THE HONOURABLE MR JUSTICE STUART-SMITH**

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**Between :**

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| **Birmingham City Council** | **Claimant** |
| **- and -** | |
| **Amey Birmingham Highways Limited** | **Defendant** |

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**Anneliese Day QC and George McDonald** (instructed by **DLA Piper UK LLP**) for the **Claimant**
**James Howells QC and Marc Lixenberg** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 4th October 2018

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# Judgment Approved

**The Honourable Mr Justice Stuart-Smith :**

## Introduction

1. On 4 October 2018 the Claimant ["BCC"] applied for summary judgment against the Defendant ["ABHL"] in respect of a monetary claim and a claim for declarations. By a separate ex tempore judgment I determined three of the five issues that fell for determination on that date. This judgment is my reserved judgment on the last two issues.

2. This litigation arises out a PFI contract of great length and, in some respects, great complexity. I shall set out relevant terms of the contract below when dealing with the outstanding issues.

3. In briefest summary, the contract establishes a mechanism for calculating ABHL's entitlement to payment, which involves the achievement of Milestones. Certified achievement of successive Milestones feeds into a calculation that is set out in Schedule 1 to the Contract. The present litigation relates to the certification of Milestones 6 to 9.

4. At some stage a dispute arose about whether the basis of the calculations included in the Certificates of Completion for Milestones 6 to 9 was correct. BCC contended that ABHL is obliged to update the Project Network Model that forms the basis of its claims for payment and to maintain a Project Network Inventory which accurately reflects the actual extent of the Project Network and the Project Roads, which it was not doing. Because ABHL was not doing so, it was BCC's case that the Certificates for Milestones 6 to 9 should be set aside for manifest error.

5. There have been 2 adjudications that are material to this judgment. The first ["Goddard 1"] set aside Milestone Completion Certificates 6 to 9 for manifest error. That was challenged through the courts by ABHL. ABHL succeeded at first instance but the decision of the judge was reversed by the Court of Appeal: see [2018] EWCA Civ 264 at [2], [34], Part 7 (especially [86], [91]), Part 8 (especially [93]-[94] and [96]). During the period between the decision at first instance and its reversal in the Court of Appeal, BCC paid over approximately £20 million under protest and stipulated that it should be repaid if BCC succeeded in its appeal. The payment of those monies forms the factual background for Issue 4, which I consider in more detail below.

6. At [34] the Court of Appeal recorded the adjudicator's declarations as including:

> "That the Certificates of Completion for Milestones 6-9 inclusive be set aside alternatively opened up, reviewed and revised and the relevant calculations performed again by reference to the actual Project Network Inventory."

I have been told that, notwithstanding the terms of [34], ABHL did not ask the Court of Appeal to exercise its power to revise the certificates. In the result, it is not surprising that the Court of Appeal reached the conclusion that it did, namely that the Certificates should be set aside because of the manifest error it identified.

7. As set out in my earlier ex tempore judgment on the first three issues, ABHL accepted and accepts that the effect of the Court of Appeal's judgment and order is that the certificates have been set aside. It is also expressly accepted that, having been set aside, they are of no residual effect. When ABHL declined to make any repayment despite the setting aside of Milestone Certificates 6 to 9, BCC launched a further adjudication ["Goddard 2"].

8. The adjudicator's decision in Goddard 2 was long, detailed and cogent. It was issued on 5 June 2018. The adjudicator ordered ABHL to repay something over £54 million which had been overpaid by BCC pursuant to Milestone Certificates 6 to 9 because of the manifestly erroneous basis of calculation that had caused them to be set aside. Goddard 2 also addressed BCC's supplementary argument that it was and is in any event entitled to be repaid the c. £20 million (which forms part of the greater sum of £54 million) that it paid under protest between the first instance decision and the decision of the Court of Appeal. The adjudicator held that BCC's supplementary argument was well founded.

9. ABHL did not comply with the adjudicator's decision. It made no payment to BCC but, instead, exercised contractual machinery by sending a letter on 20 June 2018

setting out its dispute and correctly identified that the dispute related to a question of law. In due course BCC issued these proceedings and applied for summary judgment.

10. On 4 October 2018 I gave summary judgment in favour of BCC for the repayment of the overpaid £54 million. That left the two issues that are the subject of this judgment, namely:

    i) Issue 4: Whether BCC would in the alternative be entitled to be paid £20,593,490.24 because (a) it had paid those sums to ABHL after the earlier first instance decision on terms that they would be repaid in the event of a successful appeal by BCC to the Court of Appeal, and (b) there has now been the successful appeal as contemplated; and

    ii) Issue 5: a claim for a declaration that "in accordance with Clauses 9.2, 13.4.1 and Schedule 4 of the Contract, ABHL is only entitled to be paid its Monthly Payment on the basis of (amongst other things) valid Milestone Certificates, and the Milestone Adjustment Factor only increases from the date that those Milestone Certificates have been certified in accordance with the Contract and not before. Any retrospective recalculations of when Milestone Certificates 6 to 9 could have been achieved had ABHL acted in accordance with the Contract have no impact on the past or future Monthly Payments."

**Issue 4: Would BCC in the alternative be entitled to be paid £20,593,490.24?**

*Factual background*

11. On 7 September 2016, two days after the first instance decision, ABHL wrote to BCC:

> "You have to date withheld a total sum of £15,260,267.17 from the Monthly Payment otherwise due to ABHL on the basis that no Milestones beyond Milestone 5 have been achieved. … We therefore notify you pursuant to clause 45.4 of the Project agreement that, for the reasons set out above and as a result of the judgement, you have wrongfully underpaid ABHL the sum of £15,260,267.17 and that you are obliged to adjust the next Monthly Payment which falls 30 business days after the date of this notice, to account for this underpayment and interest."

12. On 25 November 2016 ABHL followed up this notification with a formal demand for payment which referred to "recent correspondence with regards to this matter" including its letter of 7 September 2016, and stated:

> "You should note that this letter constitutes a formal demand within the meaning of limb (b) of the definition of an Authority Default in Schedule 1 of the Project Agreement. **Failure to pay within twenty Business Days of service of this formal demand shall constitute an Authority Default.**" (Emphasis in the original)

It is common ground that Authority Defaults can ultimately lead to termination of the contract. The risk of such an outcome could not sensibly be contemplated by BCC. The formal demand therefore knowingly imposed maximum pressure upon BCC to make the payment in order to avoid the risk, whether or not the judgment at first instance was correct or would be reversed on appeal.

13. On 22 December 2016 BCC wrote to ABHL. It is apparent that there had been continuing negotiations by correspondence, as follows:

> "We write further to your two letters of 25 November 2016, including the purported threat of Authority Default if the sum of £15,260,267.17 is not repaid by 23 December 2016 … .
>
> We are disappointed that you have not taken up the suggested consensual way forward suggested in our letter of 15 December 2016. In the spirit of fostering a positive relationship between our two organisations, BCC has, without prejudice to its legal position that the sum is not payable, decided to repay the above amount under protest, but on condition that such monies will be repaid in the event of a successful appeal in relation to the judgment … .
>
> For the avoidance of doubt, we also reiterate that such payment is made on a pragmatic basis, under protest, and without any admission that the threat of Authority Default has been properly asserted by ABHL. …"

14. ABHL did not respond to this letter. The payment was made on 23 December 2016 in the sum of £15,567,719.77 inclusive of interest. ABHL retained the payment after the judgment of the Court of Appeal. ABHL did not contradict or challenge BCC's stated condition until after the Court of Appeal's judgment.

15. A second payment followed along similar lines as the first, the difference being that the first payment had already been paid under protest and on stated conditions. On 13 January 2017 BCC wrote to ABHL, after referring back to its letter of 22 December 2016 and the payment made the following day:

> "You will be aware that BCC has deducted Disputed Sums of £4,724,945.60 between September 2016 and December 2016 on the basis that the MAF should be paid at Milestone 5 level ("Further Disputed Sums").
>
> BCC's position in relation to the Milestones achieved has not changed and we continue to dispute the basis for payment of the Further Disputed Sums. However, acting in good faith and in order to demonstrate our commitment to the on-going relationship, we are prepared to make payment of these Further Disputed Sums, together with interest of £21,360.63 (giving a total of £4,746,306.23).

> This payment is made on the same conditions as set out in our letter dated 22 December 2016, i.e.:
>
> - these monies will be repaid in the event of a successful appeal in respect of the Judgment or a subsequent adjudication decision …;"

16. As before, ABHL did not respond to this letter. The payment was made on 31 January 2017 together with additional interest. ABHL retained this payment after the judgment of the Court of Appeal and did not contradict or challenge BCC's stated conditions (either in relation to the December 2016 or the January 2017 payment) until after the Court of Appeal's judgment.

17. After the Court of Appeal's judgment BCC requested repayment of the £20,593,490.24 it had paid under protest, and interest. ABHL refused to repay those sums on the grounds that BCC's stated conditions were "simply to record [BCC's] expectation that the TCC Judgment Amount would be paid back in the event that [BCC] was successful in any appeal." On any view, it is self-evident that ABHL's summary of what BCC had said was materially inaccurate. BCC had said nothing about expectations or recording them: it had expressly made the payments "on condition". BCC therefore referred the dispute about the c. £20 million as part of Goddard 2. In these proceedings it claims that the circumstances set out above had the effect that "there was a specific, legally binding agreement between the parties that the sum of £20,593,490.24 would be repaid by ABHL following a successful appeal. As the appeal succeeded, these monies are repayable."

18. ABHL resists judgment on this issue on the grounds that:

    i) BCC did not ask ABHL to agree to its "condition", and did not await a response from ABHL to its correspondence before making payment;

    ii) ABHL did not accept that "condition" either at the time or subsequently;

    iii) ABHL's retention of the monies cannot on any sensible view be construed as an acceptance of BCC's condition;

    iv) The form of electronic payment transfer made was such that ABHL took no action "to accept" the said payments; there was therefore no unequivocal conduct by ABHL which could be construed as an agreement to BCC's condition.

19. Although the parties referred to a number of different authorities, there is essential agreement about the question of principle that arises, namely: does objective assessment of the facts in this particular case demonstrate that there is sufficient agreement that the monies should be repaid in the event of a successful appeal? In approaching this question, I respectfully endorse the observation of Neuberger J (as he then was) in *Nurdin and Peacock Plc v DB Ramsden and Co Ltd* [1999]1 WLR 1249 that:

> "… the law [should] be slow to hold that a creditor, who has been paid more than he is owed by a debtor who has made it

> clear in advance that he expects to receive the overpayment back if he turns out to be right, should be entitled to keep the overpayment."

That said, the observation cannot of itself give the answer to the question.

20. Although the contract between BCC and ABHL has many features of a relational contract, I do not consider it necessary to rely upon obligations of contractual good faith in order to answer the present question. That does not mean that the parties' knowledge and understanding of the contractual context in which the payments were made was irrelevant; and for that reason I think that the proper starting point is ABHL's threat to treat non-payment of the monies it was demanding on the basis of the first instance judgment as an Authority Default. If the first instance decision were to stand, then the threat may well have been justified: BCC certainly could not afford to take that risk. ABHL's action therefore meant that BCC was virtually bound to take steps to avoid the risk of an Authority Default, whether or not ABHL's position (based as it was on the first instance judgment) was justified. Conversely, if the appeal was successful, there would be no justification for ABHL's demand and threat and no justification for ABHL to retain the monies.

21. It would therefore be wrong to see BCC's letter of 22 December 2016 as the first relevant step in the sequence of events with which this issue is concerned. ABHL must certainly have known that its prior threat of an Authority Default (a) would impose maximum pressure upon BCC, (b) would probably lead to monies being transferred (as was the intention) and (c) would not be justified if the appeal was successful.

22. Turning to the letter of 22 December 2016, BCC's position was clearly expressed and had four strands. First, the payment was being made under the threat of Authority Default, which it considered to be unjustified. Second, BCC was making the payment "without prejudice to its legal position that the sum is not payable". Third, it had decided to repay the above amount under protest. Fourth, the payment was being made under protest "but on condition that such monies will be repaid in the event of a successful appeal in relation to the judgment … ." The fourth strand is critical. In one sense it may be said to be weaker than the equivalent phrase in *Nurdin* ("Obviously the overpayment will be refundable if [Nurdin] is successful at trial") since that was characterised by Neuberger J as being a statement of what Nurdin understood would happen in the event of its succeeding. By contrast, the critical strand in the present case does not purport to be a statement of mutual understanding. However, that simultaneously makes BCC's phrase stronger because it states unequivocally that it is only prepared to make the payment on the stated condition. ABHL therefore knew that BCC would not (and did not) make and did not consent to ABHL keeping any payment except on that condition.

23. There were a number of options open to ABHL, including (a) responding expressly that the condition was acceptable before payment was made, (b) responding expressly that the condition was acceptable after payment was made, (c) responding expressly that the condition was unacceptable before the payment was made, (d) responding expressly that the condition was unacceptable after the payment was made (but before the condition became operative when BCC's appeal to the Court of Appeal was successful), or (e) not responding at all but keeping the money.

24. The context for ABHL's non-response is a continuing correspondence in which the parties set out their opposing positions and points of disagreement, as summarised above. In that context, I find that ABHL's non-response to BCC's letter stipulating the condition on which it was prepared to make the payment combined with the retention of the monies without giving any indication that the condition was unacceptable should be viewed objectively as accepting that BCC's letter of the 22 December 2016 was the conclusion of the correspondence and was not further disputed. I do not think that the fact that the payment was made by electronic transfer rather than being physically handed over makes any material difference to the proper analysis: ABHL accepted at the hearing that it knew of the payment and that it was retaining the monies just as well as if it had been paid by the physical handing over of cash or a cheque.

25. Furthermore, I reject ABHL's submission that what happened amounted to either an alteration of the contract or waiver of a term or provision which was precluded by the terms of the contract. The most that can be said is that BCC made a payment to which it is (now) clear there was no contractual entitlement on condition that it would be repaid if BCC was proved to be right about the lack of contractual entitlement.

26. For these reasons, which are essentially the same as those given by the adjudicator, I would have upheld BCC's alternative claim to be repaid the c. £20 million plus interest.

**Issue 5: the basis of calculation**

27. The issue may be shortly and starkly stated. BCC submit that the uplift attributable to achieving Milestones can only be implemented from the date when such Milestones are certified. ABHL submit that it is possible to do a retrospective calculation by reference to the date when the criteria for certifying Milestones were achieved in fact rather than the date on which the Milestone was in fact certified. Goddard 2 expressed ABHL's proposition in slightly different terms:

> "ABHL contends that the dates upon which their performance necessary to the achieving of Milestones 6 to 9 was *in fact* achieved should be retrospectively calculated, such that there can be determined the dates on which each of the latter Milestones would have been certified, had ABHL made application in accordance with the terms of the Contract."

28. This is a pure question of law which may be suitable for summary determination. At the hearing BCC relied upon certain documents which it said showed that ABHL had never achieved the performance necessary for certifying Milestones 6 to 9 and so ABHL's submissions on the issue of law could be dismissed as academic. I am not persuaded that the documents speak with the clarity that BCC suggest. I am certainly not satisfied that I could rule on this issue of disputed fact in the context of the present application for summary judgment. I therefore consider only the point of law that is raised.

29. As will be seen, the Contract does not make separate or discrete provision for how ABHL's entitlement should be calculated in the event that Milestone Certificates are set aside as has happened. The Court of Appeal was not asked to consider the

question and did not do so. It is quite impossible to answer Issue 5 by reference to the terms of the Court of Appeal's Order. ABHL points to [3] of that Order, which states:

> "The Certificates of Completion for Milestones 6 to 9 should be set aside for manifest error and recalculated on the correct basis (i.e. using the Models as updated …) and the current condition should be calculated on the same basis."

However, this does not in terms or by implication appear to mandate a notional or actual repetition of the certifying process with a view to backdating the certificates for those Milestones or creating certificates that have retrospective effect. There is nothing in the judgment to support a submission that the Court of Appeal intended its order to be interpreted in such a way. To the contrary, the Court of Appeal set aside the existing Certificates 6 to 9. It did not itself purport to open them up or review or revise them. Nor did it direct that (rather than being set aside) they should be opened up, reviewed or revised by others. What can be said with complete confidence is that the Payment Mechanism under the contract is based upon the provision of valid certificates in accordance with its terms. It is inconceivable that the Court of Appeal intended by a side-wind and without any discussion of the principles involved to substitute a notional procedure that has no place or provision in the contract. It is therefore necessary to look to the contract to see whether ABHL's preferred approach is open to the Independent Certifier going forward.

30. Turning to the contract:

i) Part 1 of Schedule 4 to the Contract is entitled "Payment Mechanism";

ii) The Monthly Payment is calculated in accordance with a formula set out at [2.1] of Schedule 4. One element of the Monthly Payment formula is the Monthly Unitary Charge ["MUC"];

iii) The MUC is calculated in accordance with a formula set out at [1.4] of Schedule 4. One element of the MUC formula is the Milestone Adjustment Factor ["MAF"], by which other elements are multiplied to arrive at the MUC;

iv) The MAF is calculated in accordance with a formula set out at [1.6] of Schedule 4, namely: "MAF = 0.6 + Milestone step-up."

v) Milestone step-up is calculated in accordance with a further formula set out at [1.6] of Schedule 4, namely: "Milestone step-up = the sum of the relevant step up values specified by Table 1 below being attributable to the Milestone Completion or Partial Milestone Completion (as applicable) in accordance with clause 9." Table 1 sets out the maximum milestone step-up for each of milestones 1-10. The maximum milestone step-up for each milestone is 0.04 and the cumulative maximum step-up is accordingly 0.4;

vi) The effect of the formula for calculating the MAF and Table 1 is that the MAF increases by 0.04 per milestone *in accordance with Clause 9.*

vii) Clause 9 addresses the question of "Milestone Completion" which, as set out above, is integral to the definition and calculation of Milestone step-up and,

consequently, to the definition and calculation of the MAF and the MUC and, hence, the Monthly Payment;

viii) Clause 9.2 states:

> "Where the Independent Certifier has issued a Certificate of Completion in respect of a Milestone pursuant to the provisions of clause 13 (*Certification)* that Milestone shall, from the relevant Milestone Completion Date, be taken into account for the purposes of calculating the Monthly Unitary Charge in accordance with paragraph 1.4 of the Payment Mechanism."

The reference to paragraph 1.4 of the Payment Mechanism is a reference to [1.4] of Schedule 4, referred to at (iii) above;

ix) Clause 13.4 is entitled "Dates on which Milestone Completion can occur". Clause 13.4.1.1 states:

> "In respect of each Milestone … the Milestone Completion Date shall be the date upon which the Certificate of Completion is issued for that Milestone, provided that if a Certificate of Completion is issued before the relevant Planned Milestone Completion Date, the Milestone Completion Date shall be the same as the Planned Milestone Completion Date; …"

x) Clause 13.5 is entitled "Effect of Issue of Certificates of Completion etc". Clause 13.5.1 states:

> "As between the Parties the decision of the Independent Certifier to issue any Certificate of Completion, Certificate of Partial Completion or Certificate of Non-Completion at any time shall, in the absence of fraud or manifest error, be final and binding on the Parties but without prejudice to the right of either Party to make a claim under the Independent Certifier's Appointment."

xi) The term "Milestone Completion Date" appears in both clause 9.2 and clause 13.4.1. For the purposes of the Contract "Milestone Completion Date" (as defined) means "the date determined in accordance with clause 13.4.1 (*Dates on which Milestone Completion can occur*)".

31. ABHL has not identified any other provisions of the contract that determine or influence the date upon and from which Milestone step-ups may be implemented as part of the calculation of the Monthly Payment.

32. In my judgment the effect of these provisions is clear. Pursuant to Clause 9.2, a Milestone shall be taken into account for the purposes of calculating the MUC "from the relevant Milestone Completion Date". The Milestone Completion Date is defined, in accordance with Clause 13.4.1.1, as being "the date upon which the Certificate of Completion is issued for that Milestone." There is express provision for what is to happen if a Certificate of Completion is issued before the relevant Planned Milestone

Completion Date; but there is no provision for contractual consequences if a Certificate of Completion for a Milestone might in fact have been issued earlier than it was. To the contrary, Clause 13.5.1 makes plain that the decision of the Independent Certifier to issue a Certificate of Completion is final and binding on the parties in the absence of fraud or manifest error, albeit without prejudice to the right of a party to make a claim against the Independent Certifier.

33. The express provision that a Milestone can be taken into account for the purposes of calculating the MUC "from the relevant Milestone Completion Date" is, in my judgment, clearly inconsistent with taking the Milestone into account for those purposes before the relevant Milestone Completion Date. This contractual structure could have adverse consequences but there is nothing commercially absurd about an interpretation that provides certainty about when the Milestone becomes relevant and leaves the parties with the possibility of a remedy against the Independent Certifier. Nor is there any commercial absurdity in a complex contractual mechanism for payment that has built into it a delay between the actual date upon which the criteria for completion are achieved and the date on which certification occurs and a milestone may be achieved. That is what the contract provides and the only assumption the Court can properly make is that ABHL priced its contract accordingly. It could even be said that the interpretation that appears clearly on the face of the express terms of the contract may have a salutary and beneficial effect in discouraging strained and wrongful interpretations of the contract such as have been put forward in this dispute to date.

34. ABHL submitted that I should not determine this issue because there is a material relationship between the terms of the Contract and of its related Subcontract. It has not submitted that there is any feature of the Subcontract that renders a decision on the interpretation of the Contract either uncertain or unworkable. Furthermore, the harder ABHL presses its submission that the Contract and Subcontract are related and in similar terms, the less likely the risk of inconsistent decisions appears to be. In my judgment if (as is the case) I consider the position to be sufficiently clear to justify giving summary judgment on this issue, I should also conclude that the risk of inconsistent decisions on these points of construction is remote. I am not persuaded that ABHL has identified any analogy with any other case of connected contracts and subcontracts that militates in favour of declining to decide the issue.

35. For the avoidance of doubt, my decision addresses the issue that arises where there is no subsisting Milestone Completion Date, either because no Certificate of Completion has been issued or because a Certificate of Completion that has been issued has been set aside. In these circumstances, a Milestone may only be taken into account for the purposes of calculating the MUC from the relevant Milestone Completion Date i.e. the date upon which the Certificate of Completion is issued for that Milestone. At and from that date the Milestone step-up may be increased for the purposes of calculating the Monthly Payment, but not before and not retrospectively so as to have the same effect as if the Certificate had been issued earlier. It is on that basis that I would make the declaration sought by BCC at [60.1] of its Particulars of Claim.