CLAIM NO: HT-2018-000263

Neutral Citation Number: [2019] EWHC 1155 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building,
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London EC4A 1NL

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Before:

MR JUSTICE FRASER

BETWEEN:

MIDAL CABLES LIMITED

Claimant/Respondent

- and -

AMEC FOSTER WHEELER GROUP LIMITED

Defendant/Applicant

MR T OWEN (instructed by ASV Law) for the Claimant/Respondent
MR T CRANGLE (instructed by Pinsent Masons LLP) for the Defendant/Applicant

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Approved Judgment

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MR JUSTICE FRASER:

1. This is an application by the defendant for certain preliminary issues. Before I identify what they are I will explain the nature of the litigation. The claimant is a company called Midal Cables and it brings what is essentially an invoice claim in respect of the supply of very many kilometres of what is called conductor to the defendant, Amec Foster Wheeler Group Limited ("Amec"). These are lengths of conductive material in cable form.

2. The Particulars of Claim make it clear that an initial supply of conductor was provided to the defendant. That was said by the defendant to be defective. Then a re-supply was provided as well. The claim is very slightly in excess of £2 million. There are two separate supplies which are the subject matter of the litigation. One is referred to in the Particulars of Claim as the Araucaria conductor, and that was for works being performed by the defendant to the National Grid in Monk Fryston in West Yorkshire. There was another supply of what is called Sorbus conductor, and that was supplied for works to the National Grid at the Rochdale Whitegate Refurbishment Project, which (as anyone who knows their geography will know) is also in Yorkshire.

3. Amec challenges the claim on a number of grounds. One of them is what is called in some of the other cases a "battle of the forms", namely which party's terms and conditions applied to the provision of the conductor. However, Amec also brings a counterclaim for losses, substantially losses for delay, together with other prolongation costs said to have been caused by the supply of defective conductor. The total value of the counterclaim is £7,509.385, i.e. just in excess of £7.5 million.

4. Mr Crangle, for Amec, has provided a drafting of preliminary issues which he submits ought to be disposed of first. I am just going to explain what they are. The question of preliminary issues was raised at an earlier stage in the proceedings by Amec's solicitors, but the issues themselves had not been identified, and when the parties were before me more recently I explained that the issues themselves needed to be identified precisely. At paragraph 9 of Mr Crangle's very helpful skeleton he identifies what he calls the "proposed issues", and I will read out what they are.

> "a. Did AMEC and Midal enter into an agreement on 6 March 2013 pursuant to which it was agreed that any future contract for the supply of goods by Midal to AMEC would be governed by AMEC's Standard Terms and Conditions?
>
> b. Was the Araucaria Contract governed by:
>
> i. AMEC's Standard Terms and Conditions of Purchase; or
>
> ii by the terms contained in the Araucaria quotation and Araucaria revised offer; or
>
> iii By a number of terms and conditions from each party's standard terms and by implied terms?
>
> c. Was the Sorbus Contract governed by:

> i AMEC's Standard Terms and Conditions of Purchase; or
>
> ii by the terms contained in the Sorbus quotation; or
>
> iii by a number of terms and conditions from each party's standard terms and by implied terms?"

5. Mr Crangle has explained that if these preliminary issues are resolved they will have the following benefits. One is that, depending on the outcome, they may render a full trial on the cross claim or counterclaim wholly unnecessary, because (and this is an ironic position) if he loses on the preliminary issues then the effect of Midal's terms and conditions on the terms printed on the back of the relevant documents by Midal means he would not be entitled to bring a counterclaim at all. He also explains that there would be limited or, on his case, no evidence of fact necessary to resolve these issued, and that the matter could be resolved predominantly on the documents, and that, in his submission, the hearing of these issues could all be dealt with in less than a day. He also submitted that the point as to whose terms govern the supply of the contract has proved a fairly intractable point in terms of settlement discussions, and there will be the effect of encouraging or facilitating ADR if the TCC resolves these issues separately and hives them off in useful way and deals with them first.

6. This application is opposed by Mr Owen for the claimant on a number of grounds. I will explain briefly what they are. He points out that because of the way the case is pleaded a trial would be necessary in any event, regardless of the outcome on any preliminary issues tiral. He has also drawn my attention to paragraph 16 of the defence, which says (and I paraphrase):

> "Owing to the fact that the Auraucaria supplied by Midal was defective, an agreement was reached between Mr Master and Mr Hatton and/or a variation to the Auraucaria contract was concluded that Midal would supply an additional 18 drums of Auraucaria conductor on a sale or return basis as spare material in order to prevent further delay to Amec's programme."

The defence pleads that agreement was contained in and/or evidenced by an email exchange between Mr Master and Mr Hatton on 16 June 2016, and it is in issue as to how many drums were supplied pursuant to that alleged oral agreement.

7. He has also identified that by dealing with the preliminary issues separately there will be a considerable increase in costs. He has drawn my attention to the fact that Amec's own costs budget has a figure in relation to a preliminary issues trial of £280,000 approximately, together with witness evidence which is said to be going to cost £29,000. He has identified that that portrays a rather different position than the one Mr Crangle has explained to me today, and effectively says that as a claimant with limited resources they should not be required to spread those resources across a number of different tactical battles, or a number of separate battles chosen tactically by Amec, and that effectively the court should be very slow to put the claimant to two separate trials. He also submits that there is a risk that the action will simply become somewhat more attritional. He has also identified that there will be arguable issues on set-off anyway in any event, based on the way the defence is pleaded, particularly

paragraph 44(3) and 49 which pleads to his paragraph 33(1) in respect of Araucaria and 35(3) of the Particulars of Claim in respect of Sorbus.

8. The correct starting point, in my judgment, is what the TCC Guide says about this. There is a whole section dealing with preliminary issues, because preliminary issues are sometimes adopted in this court and are often applied for by one party or another. In paragraph 8.2.1 of the Guide, under the heading "The significance of the Preliminary Issues" the following entry appears:

> "The court would expect that any issue proposed as a suitable PI would, if decided in a particular way, be capable of:
>
> - resolving the whole proceedings or a significant element of the proceedings; or
>
> - significantly reducing the scope, and therefore the costs, of the main trial; or
>
> - significantly improving the possibility of a settlement of the whole proceedings."

> 8.2.2 Oral evidence:
>
> "The court would ordinarily expect that, if issues are to be dealt with by way of a PI hearing, there would be either no or relatively limited oral evidence. If extensive oral evidence was required on any proposed PI, then it may not be suitable for a PI hearing. Although it is difficult to give specific guidance on this point, it is generally considered that a PI hearing in a smaller case should not take more than about 2 days, and in a larger and more complex case, should not take more than about 4 days."

9. Pausing there, it is obvious to me that these preliminary issues would potentially reduce the scope of the proceedings. They will not, however, resolve the whole of the proceedings. The point as to whether they significantly improve the possibility of a settlement, which is one of the points argued persuasively with by Mr Crangle, is rather undermined when one's attention is drawn to a mediation notice sent by the claimant on 28 December 2017. This was an offer to mediate on the assumption that Amec's terms applied to the supply of the conductor. That invitation to mediation was not accepted, but the notice itself was entirely ignored, such that a chaser had to be sent a week later on 25 January 2018. This states in block capitals across the middle of it prior to the text, "DO NOT IGNORE". I consider that rather undermines the argument which Mr Crangle has advanced that resolving whose terms and conditions apply will in fact improve the possibility of a settlement. A party behaving like this in relation to an offer to mediate is not readily categorised as one willing to consider settlement. However, it still needs to be considered because of the two parties' competing cases. It is therefore, in my judgment, appropriate to consider the way that the comments in the TCC Guide have been applied in fact.

10. I considered this issue a couple of years ago in a case called ***Larkfleet Limited v Allison Homes Eastern Ltd*** [2016] EWHC 195 (TCC). In that case I considered at [12] to [13] what the correct approach should be when a party applies for preliminary issues. Mr Crangle relies on the use of preliminary issues in that case as effectively supporting or being an explanation by me favourable to his application. However, a close analysis of that case will, I am afraid, show that that is not necessarily the correct way of portraying it. At [10] of that judgment the parties were ordered to have preliminary issues. Paragraph 5 of the order, which was not an order made by me, stated:

> "5. There shall be a Preliminary Issues hearing at 10.30am on the first available date after 12 January 2016 on the issue of whether the Claimant's case is statute barred…
>
> 6. The parties shall prepare for the Preliminary Issues hearing in accordance with the Technology and Construction Court Guide."

11. It is obviously not the case that I was entirely convinced that that was suitable for preliminary issues for this reason. I identify in [11] that no directions were given for service of evidence by either party, and the Technology and Construction Court Guide itself says at paragraph 8.2.2 that if issues are to be dealt with as preliminary issues "there would be either no or relatively limited oral evidence". I then referred in paragraph 12 to the case of ***McLoughlin v Jones*** [2002] QB 1312, in which the Court of Appeal made clear what the approach should be in terms of ordering a hearing of a trial of preliminary issues.

> "That case concerned a claim brought by Mr McLoughlin against his solicitors for breach of contract and negligence. Those solicitors had represented him on criminal charges of robbery and causing grievous bodily harm, for which he was initially convicted and sentenced to four years imprisonment. He explained to his solicitors prior to his trial that he had been wrongly identified and instructed them to seek witnesses to the incident in question, which they failed to do. After he was convicted and imprisoned, he himself advertised for witnesses in the local newspaper and by this means found a witness who had not appeared at the trial."

That witness would give evidence in favour of his explanation that he had not been there.

> "Three months after his conviction, upon being told about this fresh evidence, the Court of Appeal quashed his conviction and ordered a retrial. At that second trial he was acquitted. He brought proceedings against his first firm of solicitors, based upon the serious consequences he had experienced as a result both of being convicted and imprisoned, including the serious psychiatric reaction and breakdown he had suffered. On the trial of a preliminary issue as to whether the defendants owed him a duty to protect him from any foreseeable psychiatric

> illness, and the judge at first instance held this was not a reasonably foreseeable consequence and struck out his claim. This decision was reversed on appeal, in the course of which comment was made by the Court of Appeal on the use of preliminary issues. David Steel J stated the following."

I distilled them in subparagraphs 1 to 4 of paragraph 12, and I will just read out what they were:

> "1. The outcome of the appeal in that case was "attributable in large part to the parties' failure to use the procedure for determining preliminary issues properly";
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> 2. The claim was highly fact-sensitive but no attempt had been made to establish the factual premise for the issue of law on which the judge was invited to rule;
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> 3. "As Lord Scarman observed in *Tilling v Whiteman* [1980] AC1 at 25***:*** **'**Preliminary points of law are too often treacherous short cuts'. The dangers are all the greater where, as here, the preliminary issues are set in motion in a casual and unstructured way";
>
> 4. The right approach to preliminary issues should be (inter alia) that the questions should usually be questions of law and should be decided on the basis of a schedule of agreed or assumed facts." (emphasis added)

12. It is obviously the case that there will be a vast array of disputed facts, in my judgment, if I were to order the preliminary issues sought by Mr Crangle. I asked him if he considered that the case could be resolved at preliminary issues by calling no fact at all, and he said he considered that it could. However, upon slightly closer analysis and when it was made clear by Mr Owen that he would be calling witnesses, Mr Crangle said that perhaps there might be the requirement for what he called "limited witnesses". He also rather optimistically said that the preliminary issues could be dealt with in one day. I am afraid that I completely disagree with him about that. Just considering and deciding whether preliminary issues should be ordered has taken half of the entire morning. In my judgment, the very least time that would be required to be set aside for preliminary issues in this case would be two days, and the case would probably have a reasonable risk of going into a third day.

13. In my judgment, ordering preliminary issues in this case on facts which are not assumed or agreed would simply lead to a disjointed trial at greater cost and expense for the parties, and taking into account all the relevant factors, as I must as a case management decision, in my judgment the application fails and I am not going to order the preliminary issues contended for by Mr Crangle.

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