Neutral Citation Number: [2021] EWHC 3450 (TCC)

Cases No: HT-2020-000364 and HT-2021-000411

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

Royal Courts of Justice,

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 21/12/2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

In claim no: HT-2020-000364

FAIRGROVE HOMES LIMITED **Cla**

- and –

MONUMENT TWO LIMITED **Defe**

And in claim no: HT-2021-000411

Between :

MONUMENT TWO LIMITED **Cla**

- and –

FAIRGROVE HOMES LIMITED **Defe**

- -

- -

Edward Jones (instructed by **The Legal Director Limited, Solicitors**) for Fairgrove Homes Limited

Simon Clegg (instructed by **Underwood Vinecombe LLP, Solicitors**) for Monument Two Limited

Hearing dates: 1 December 2021

Further written submissions: 3 and 6 December 2021

- -

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.

....

THE HONOURABLE MR JUSTICE MORRIS

Mr Justice Morris :

Introduction

1.
There are before me two matters. First an application by Fairgrove Homes Limited ("Fairgrove") in proceedings HT 2020-000364 against Monument Two Limited "("Monument") as defendant to enforce a Tomlin order dated 3 December 2020 made in those proceedings ("the Tomlin Order"). By that application ("the Fairgrove Application"), Fairgrove seeks to secure the release of funds presently held in escrow. I refer to the proceedings in which this application is made as "the Enforcement Proceedings". Secondly consideration of a Part 8 Claim in proceedings HT-2021-000411 brought by Monument as claimant against Fairgrove as a defendant ("the Part 8 Claim"). By the Part 8 Claim, Monument seeks an order that the funds remain in escrow pending the outcome of a final account process between the parties.

The Factual background

2.
Fairgrove is a building contractor. Monument is a property developer. Fairgrove was engaged by Monument to build a residential development in Willington, Derbyshire under a construction contract dated 1 August 2017 and pursuant to a joint venture agreement ("the Agreement") incorporating an amended JCT D & B Contract 2016. Disputes arose between the parties during performance of the Agreement, leading to a settlement agreement dated 14 November 2019 ("the Settlement Agreement").

The Settlement Agreement

3.
The terms of the Settlement Agreement provided, inter alia, as follows (Party A is Monument and Party B is Fairgrove):

"**BACKGROUND**

(D) The Parties have settled their differences in relaton to the Dispute and have agreed terms for the full and final settlement of the Dispute and wish to record those terms of settlement, on a binding basis, in this Settlement Agreement.

…

(E) The Agreement provided that Party B would "construct the Development on the basis of "Cost price plus 10%" in relation to those items specified in the Development Appraisals ... under the headings — "Construction Costs" exhibited to the Agreement. An issue as to the correct value of those Construction Costs has also arisen. For the avoidance of doubt, the issue relating to those Construction Costs is specifically EXCLUDED from this Settlement Agreement and the Parties agree that it shall be subject to a separate method of resolution in accordance with the JCT Contract and the Agreement.

Agreed Terms

Definitions and interpretation

…

Construction Costs: all those costs included in the Development Appraisals under headings of Construction, Site Development and Site Overheads.

…

Effect of this agreement

…

2.1 Party A shall pay to Party B the total sum of £350,000.00 (less any amount specified at 2.1 (d) below) divided into instalments payable as follows:

(a)
the amount of £100,000.00 in accordance with the Undertaking given by Messrs. Ashton Bond Gigg at Annex A to this Settlement Agreement from sale proceeds of Plot 19 at the Phase 1 Development. Completion of all construction works to Plot 19 by Party B by no later than 24th November 2019; and

(b)
the amount of £100,000.00 in accordance with the Undertaking given by Messrs. Ashton Bond Gigg at Annex A to this Settlement Agreement from sale proceeds of Plot 20 at the Phase 1 Development. Completion of all construction works to Plot 20 by Party A by no later than 30th November 2019; and

(c)
the amount of £100,000.00 in accordance with the Undertaking given by Messrs. Ashton Bond Gigg at Annex A to this Settlement Agreement from sale proceeds of Plot 14 at the Phase 1 Development. Completion of all construction works to Plot 14 by Party A by no later than 19th January 2020; and thereafter

(d)
the amount of £50,000 to be added to the agreed final account for Construction Costs and paid no later than 30th April 2020 in any event by way of bank transfer to Lloyds Bank plc, sort code: 30-96-18, account no: 60332668

2.2 Alternatively, if Party A elects to complete Plots 13 and 15 of the Phase 1 Development before those at 2.1(a) (b) and (c) above then proceeds of sale from those Plots will be used for payment to Party B as aforesaid in accordance with the Undertaking given by Messrs. Ashton Bond Gigg at Annex A to this Settlement Agreement.

2.3 Interest shall accrue and be payable by Party A on any part of the £350,000.00 that is not paid in accordance with clause 2.1 or 2.2 at the rate of 6% per annum above the base rate for the time being of The Bank of England until such time as payment is made in full.

2.4 Further it is agreed, Party B will complete the construction of Plot 19 in accordance with the JCT Contract and thereafter be released from any future obligations under the JCT Contract and/or Agreement save for resolution of Construction Costs. and in respect of any latent defects which become patent. Party A will thereafter complete Plots 13, 14, 15 and 20 of the Phase 1 Development

to the specification sold to the purchasers and in accordance with the JCT Contract and the Agreement by no later than the following Long Stop dates:

• Plot 13 - 12th February 2020

• Plot 14 — 19th January 2020

• Plot 15— 23rd February 2020

• Plot 20— 30th November 2019

For the avoidance of doubt, building materials already at the Development and/or ordered by Party B for use at the Development e.g. doors and windows must be paid for by Party A." (emphasis added)

4.
On 21 August 2020 Fairgrove referred a dispute to adjudication concerning the failure of Monument to pay £50,000 due under clause 2.1(d) of the Settlement Agreement. The parties made written submissions, each prepared by counsel. Fairgrove submitted that, as a matter of construction of clause 2.1(d), the sum of £50,000 was due in any event by 30 April 2020. Monument submitted that, as a matter of construction, that sum was not due for payment until the final account was agreed and as an addition to the agreed final account. This was the essential issue which fell for determination in the adjudication. (Monument's arguments are set out in more detail below).

5.
On 11 September 2020 Fairgrove entered a Company Voluntary Arrangement (CVA).

The Adjudicator's Decision

6.
By decision dated 23 September 2020 ("the Decision") the adjudicator, Allan Wood ("the Adjudicator") decided that Fairgrove was entitled to immediate payment of £50,000 plus interest and that Monument should pay his fees. The Adjudicator agreed with Fairgrove's construction of clause 2.1(d) of the Settlement Agreement.

7.
At paragraphs 19 to 22 of the Decision, the Adjudicator summarised Monument's submissions as follows:

"19. M2 set out further aspects of the judgment in Arnold v Britton and refer me to (and quote) paragraph 15 of the judgment. M2 state it is wrong for Fairgrove to assert one has to simply read the words and decide what they mean without reference to the background knowledge available to the Parties.

20. In respect of 'background knowledge', M2 refer to the witness statement of Mr J Hallam who states that under the JCT element of the Contract, Fairgrove were required to prepare and submit a final account within three months, which Mr Hallam states was 5 March 2020. Mr Hallam states he believes the date for payment under clause 2.1(d) of 30 April 2020 was chosen, as it was anticipated the final Account would have been ascertained and it would be clear who owed payment. M2 states, "It is for that reason that the amount of £50,000 was "to be added to" the agreed final amount."

21. M2 submit the entitlement of Fairgrove to the £50,000 sum in issue is on a two stage basis. M2 submit the first event "which has to occur is that there must be an agreed final account" and it is only once there is an agreed final account that (as a second stage) "the £50,000 can be added to it."

22. M2 submit that "in context", the words "in any event" applies to both the agreement of the final account and the addition of the £50,000 to it, allowing payment by 30 April 2020."

8.
Under the heading "Adjudicator's Decision", the Adjudicator set out his reasoning. At paragraphs 30 to 33 he set out the principles of contractual construction of contracts, referring in some detail to Arnold v Britton. Then at paragraphs 39 to 45, the Adjudicator set out his conclusions and reasons therefor, as follows:

"39. On the plain reading of clause 2.1(d) of the Settlement Agreement I do not accept M2's submission and find the words "in any event" apply only to the latest date (30 April 2020) for payment of the £50,000 sum stated therein.

40. In the Rejoinder, M2 submit the language used in clause 2.1(d) of the Settlement Agreement is ambiguous and (again) I can properly depart from the natural meaning of the provisions to interpret the intention of the Parties in respect of the sum of the £50,000 payment.

41. On a consideration of the Settlement Agreement as a whole and clause 2.1(d) in particular, I understand the intention of the Parties was that Fairgrove would be paid the total sum of £350,000 (excluding Construction Costs) and the timing of the £50,000 payment would be no later on 30 April 2020.

42. I understand the Parties expected to have agreed the final account for Construction Costs by such date. However I understand and find (and it is not unusual in the commercial world for agreements as to final accounts to be delayed/prolonged), the conclusion of the final account for the construction costs was not a condition president [sic] to payment by M2 to Fairgrove of the sum of £50,000 under clause 2.1(d). I find the Parties signify this by the use of the words "... and paid no later than 30 April 2020 in any event..."

43. I do not find clause 2,1(d) is ambiguous or unclear or that I can depart from the natural meaning of the provision. I find clause 2.1(d) provides for payment by M2 to Fairgrove of the further sum of £50,000 either (i) as an addition to the agreed final account for Construction Costs or (ii) on its own, no later than 30 April 2020, leaving Construction Costs still to be finally agreed by the Parties.

44. In this instant case and in the absence (to date) of an agreement by the Parties as to the final account, I find Fairgrove is entitled to payment from M2 of the further sum of £50,000 under clause 2.1(d), together with interest thereon in accordance with clause 23 of the Settlement Agreement.

Summary

45. In summary, I find Fairgrove has succeeded in its case and M2 shall pay Fairgrove the further sum of £50,000 together with interest in accordance with clause 2.3 of the Settlement Agreement"

Thereafter, Monument paid the Adjudicator's fees, but has failed to pay Fairgrove in accordance with the Decision.

The Enforcement Proceedings

9.
On 7 October 2020 Fairgrove commenced the Enforcement Proceedings in this Court to enforce the Decision and on the next day applied for summary judgment.

10.

Monument opposed that application supported by the witness statement of Ms Francine Waring dated 4 November 2020. She argued, first, that the Adjudicator did not have jurisdiction to decide the dispute because the Settlement Agreement was a stand-alone agreement and that the dispute arose only from that agreement; secondly, that the Settlement Agreement was not a construction contract; and thirdly, that in any event the court should grant a stay of enforcement in view of Fairgrove's financial situation and it being in a CVA. She went on to allege that Fairgrove was in breach of its obligations under the Settlement Agreement and that, upon taking a final account, Fairgrove would owe Monument very substantial sums, totalling at least £300,000 and the stay was sought due to a real risk that Fairgrove would not be able to repay Monument, if an order was made in Monument's favour in future litigation.

11.
Fairgrove's application for summary judgment in Enforcement Proceedings was due to be heard before HH Judge Bird on 4 December 2020. On the day before, 3 December 2020, the parties entered into a further settlement agreement, recorded in the Tomlin Order drafted by the parties' counsel. In its skeleton for the present hearing, Fairgrove set out some correspondence between the parties' legal representatives leading up to the Tomlin Order. I do not refer to that correspondence, since, in my judgment, its contents are not admissible on issues of construction of the Tomlin Order.

The Tomlin Order

12.
The Tomlin Order was in standard form, providing for a stay of the Enforcement Proceedings save for the carrying into effect the terms of a confidential schedule appended to the Order. The Order recorded that Monument agreed to pay Fairgrove's costs of the Enforcement Proceedings to date in the sum of £9283.

13.
The Schedule to the Tomlin Order ("the Schedule") provided, inter alia, as follows:

"1. The Defendant shall pay the sum of £51,211.64 (the "Funds") to Messrs. Aston Bond Gigg solicitors (the "Escrow Agent") by no later than 11 December 2020.

2. <u>Subject to paragraph 3 below</u>, the Escrow Agent shall release the sums held pursuant to paragraph 1 as soon as reasonably possible on receipt of:

a)
a payment instruction signed by both the Claimant and the Defendant directing the Escrow Agent to release the Funds to the party identified in that instruction; or

b)
a copy of a Court Order to the effect that <u>the Court has determined, on a final and unappealable basis, whether the Claimant was or is entitled to the £50,000 pursuant to clause 2.1(d) of the Settlement Agreement</u> dated 14 November 2019. In that event, <u>the Funds are to be paid to the party found by the Court to be entitled to receive or withhold those Funds, as the case may be</u>.

3. In the event that the Defendant has not commenced Part 8 or other proceedings against the Claimant <u>to determine its liability to pay the Claimant any sums pursuant to clause 2.1(d</u>) within 120 days of the date of this Agreement, any Funds held by the Escrow Agent pursuant to paragraph 1 will be paid to the Claimant, without set off or deduction." (<u>emphasis</u> added)

14.
In this way, the Tomlin Order compromises and settles the underlying disputed issues in the Enforcement Proceedings. Fairgrove contends that these provisions provide for three possible outcomes: first, that the parties reach a further settlement; secondly that the Court determines, on a final basis, whether or not Fairgrove is entitled to the £50,000 (and in which case Monument are required to bring further proceedings); and thirdly, if Monument fails to commence relevant proceedings (as defined in paragraph 3) within 120 days, then the funds are to be released to Fairgrove.

Events following the Tomlin Order

15.
Thus, under the terms of paragraph 3 of the Schedule, Monument had until 1 April 2021 to issue proceedings "to determine its liability to pay Fairgrove any sums pursuant to clause 2.1(d)".

The Part 8 Claim

16.
On 30 March 2021, Monument issued a Part 8 Claim in Derby County Court accompanied by a witness statement from Mr Jaspal Singh Sahota dated 26 March 2021. Under "Details of Claim", the Part 8 Claim stated as follows:

"[Monument] seeks a declaration from the Court that the funds held in the escrow account by Security for Express Limited under reference HT-2020-00364 – SfE Ref: DE 11DF-01A remain in the escrow accountpending the outcome of the final account which is currently being prepared by the Claimant." (emphasis added)

17.
The Claim Form was accompanied by a draft order in very similar terms, as follows:

"It is ordered that:

1.
The funds held in the Escrow account by Security for Express Limited under reference HT-2020-00364-SfE Ref: DE11 DF-01 A are to remain in the escrow account pending the outcome of the final account which the Claimant is ordered to serve on the Defendant once the final account has been determined."

18.
The basis upon which Monument seeks such an order is not clear. In his supporting witness statement Mr Sahota makes a variety of points. In essence he largely repeats the grounds of opposition to the Enforcement Proceedings contained in Ms Waring's statement (as set out in paragraph 10 above). At paragraph 25 of his witness statement, he states as follows:

"The Claimant has placed the sum of £51,215.00 in an escrow account and seeks the funds remain held until the final account is prepared which will be at some time in the near future".

Mr Sahota makes no reference to, nor provides any evidence said to be relevant to, the question of construction of clause 2.1(d) of the Settlement Agreement. Further I note that almost 9 months later no final account has been prepared.

The procedural course of the Part 8 Claim and the Enforcement Proceedings

19.

On 1 April 2021 the Part 8 Claim was transferred to the Business and Property Court at Birmingham. The claim was to be placed before a judge for any necessary direction and consideration as to whether it should be consolidated with the Enforcement Proceedings which were currently stayed. On 26 April 2021 Fairgrove acknowledged service. On 28 April 2021 it was stayed by consent order to allow the parties to negotiate and in September 2021 it was transferred to the TCC and consolidated with the Enforcement Proceedings.

The Applications

20.

By the Fairgrove Application, made by application notice dated 20 October 2021, Fairgrove applies (in the consolidated proceedings) to enforce the Tomlin Order, seeking in particular specific performance of paragraph 3 of the Schedule and a declaration that Fairgrove is entitled to the funds held in escrow in accordance with that paragraph. Fairgrove alleges that Monument had failed to comply with the terms of the Tomlin Order and therefore the funds in the escrow have become payable to it.

21.

The Fairgrove Application is supported by the second witness statement of Mr Smalley also dated 20 October 2021. That witness statement is stated to be made, not only in support of the Fairgrove Application, but also "to reply to [Monument's] Part 8 Claim, and set out the evidence that Fairgrove will rely upon in response to that claim". In that witness statement Mr Smalley made it clear that Fairgrove's case is that the Part 8 Claim is not the claim envisaged by paragraph 3 of the Schedule, as it did not seek the court's decision on Monument's liability to pay under clause 2.1(d), and that, as a result, because Monument has not issued such proceedings, Fairgrove is entitled to immediate receipt of the funds held in Escrow. In this way Fairgrove made it plain that it was seeking determination of issue (1) (as identified in paragraph 25 below).

22.

Fairgrove applies now for declarations that it is entitled, on a final basis, to payment of the funds held in escrow and for orders that will enable those funds to be released to it by the escrow agent, requiring Monument to take all reasonable steps to procure that the escrow agent pays the funds out.

23.

As regards the Part 8 Claim, there is an issue as to what falls for decision by the Court now. Monument now contends that at this stage the Court should make directions for the determination, at a later date, of its substantive claim. Fairgrove contends that, if contrary to its primary case, the Part 8 Claim does fall within paragraph 3 of the Schedule, then the trial of that claim is now before the Court, which should determine it once and for all (and in its favour).

Directions of Mrs Justice O'Farrell on 29 October 2021

24.

On 29 October 2021 Mrs Justice O'Farrell made an order for directions in the consolidated proceedings, leading up to the hearing before me ("the 29 October Order"). After referring, in the recitals, to both the Part 8 Claim and the Fairgrove Application (and their content), the 29 October Order provided, inter alia, as follows:

“1. The Part 8 claim in HT-2021-000411 shall be listed to be heard with the Part 7 claim in HT-2020-000364, namely a remote hearing on 1 December 2021 at 10:30 am with a time estimate of 2 hours (this time may be varied at short notice to accommodate the listing requirements of the court).

…

Provision of documents for the hearing

4. The parties shall co-operate in ensuring that all documents necessary for the Court to determine the Part 7 and Part 8 claims are made available in electronic form in good time before the hearing.

…

6. Each party should produce one skeleton argument, addressing the issues arising in both the Part 7 and Part 8 claims. …” (emphasis added)

The Issues and the Parties’ Submissions

25.
The following issues arise for determination now:

(1)
Does the Part 8 Claim constitute proceedings falling within the terms of paragraph 3 of the Schedule to the Tomlin Order?

(2)
If the answer to issue (1) is yes:

(a)
Should the Court (i) determine now the Part 8 Claim (and in particular the question of construction of clause 2.1(d)) or (ii), alternatively, make further directions leading to a later trial of the Part 8 Claim, along the lines suggested by Monument?

(b)
If the answer to (a) is (i) above, what is the Court’s determination of the Part 8 Claim?

The Parties’ submissions in summary

26.
Fairgrove submits as follows:

(1) Monument has not commenced proceedings “to determine its liability to pay the Claimant any sums pursuant to clause 2.1(d)” within the meaning of paragraph 3 of the Schedule. Rather the Part 8 Claim is a claim merely that the funds in escrow remain there pending the outcome of a final account. Thus, under the terms of paragraph 3, the sums in the escrow account are to paid out to Fairgrove now and without deduction.

(2) Even if the Part 8 Claim does amount to proceedings falling within the meaning of paragraph 3, the Court should go on to make a final determination of those proceedings now. The hearing before me was clearly intended to be the trial of that claim. Monument has not put forward any basis for the relief it seeks and the Court is required to go on under paragraph 2b) of the Schedule to determine that claim. As a matter of construction of clause 2.1(d), it is clear that the £50,000 was due to be paid no later that 30 April 2020 and, pursuant to paragraph 2b) of the Schedule, the Court should

determine on a final and unappealable basis that Fairgrove is entitled to the £50,000 and that the fund is to be paid to Fairgrove, being the party entitled to receive it.

27.
Monument submits as follows:

(1)
By the Part 8 Claim, it has commenced proceedings to determine its liability to pay the £50,000 within the meaning of paragraph 3 of the Schedule.

(2)
At this stage, the Court should make directions for a subsequent trial of the Part 8 Claim (in March 2022), in order that all relevant background material relevant to the issue of construction of clause 2.1(d) is available to the Court. If, however, the Court proceeds to determine the Part 8 Claim now, then, as a matter of construction of clause 2.1(d), the £50,000 is not due, if at all, until after the taking of the final account between the parties.

Discussion and Analysis

Relevant legal principles

28.
Issue (1) raises a question of construction of the Tomlin Order. Issue (2)(b), should it arise, raises a question of construction of the Settlement Agreement. The legal principles applicable to questions of contractual construction are well known and clearly established: see Arnold v Britton [2015] UKSC 36 and Wood v Capita Insurance Services Ltd [2017] UKSC 24. I do not set out those principles in detail. They were appropriately summarised at paragraphs 30 to 33 of the Decision. These principles apply with equal force to a Tomlin Order as they do to any other contract: see Purghazi v Kamyab [2019] EWHC 1300 (Ch) at §24, and Sirius International Insurance Co v FAI General Insurance Ltd [2004] UKHL 54, at §18 in particular.The aim of the inquiry is to ascertain the contextual meaning of the relevant contractual language. If an agreement is ambiguous the court should prefer the construction which makes more commercial sense than one which makes less.

Issue (1): proceedings within paragraph 3 of the Schedule

29.
Fairgrove submits that this issue involves a short point of construction of paragraph 3. The Part 8 claim does not fall within paragraph 3. The compromise of paying the £50,000 into escrow was made in the context of Monument's defence to the Enforcement Proceedings seeking a stay. The Part 8 Claim does not contend that the sums in escrow should be paid back to Monument nor that Fairgrove is not entitled to payment under clause 2.1(d). Monument is not asking the court to determine the clause 2.1(d) issue on a final and appealable basis, as clearly envisaged and required by the Schedule and in particular paragraph 2b). The provisions of paragraphs 2 and 3 are focussed on one particular sum of money and to whom that particular sum should be paid – Fairgrove or Monument. The Tomlin Order was there to meet Monument's concerns about the CVA, but also required Monument to proceed promptly if it was to challenge the Decision by way of litigation.

30.
Monument submits that the provisions of the Schedule are not prescriptive as to the form of any claim that it might make. Paragraph 3 does not provide that only if a particular claim was advanced by the proceedings brought by a Part 8 claim would the amount remain in escrow. There was no requirement

that the words "clause 2(1)(d)" should appear in any proceedings commenced. The fact that on 11 September 2020 Fairgrove entered into a CVA is relevant to the construction of paragraph 3. The parties understood that, in those circumstances, the payment of the £50,000 to Fairgrove might lead to that sum not being available to discharge any liability of Fairgrove to Monument upon the taking of a final account. Monument is preparing a final account. If, as Monument contends, that account gives rise to an obligation upon Fairgrove to pay Monument, then the sums in the escrow account paid out to Fairgrove, would not be available to satisfy the debt due to Monument upon final account. Further the paragraph 3 proceedings would or might encompass issues other than the issue of construction of clause 2.1(d), as explained in Mr Sahota's witness statement. The words "determine its liability to pay the Claimant any sums pursuant to clause 2.1(d)" in paragraph 3 are not limited to the point of construction, but also to the practicality following a final account and the fact that following such an account, it is possible that no sum would ever be paid over to Fairgrove. If Fairgrove's construction were correct, then paragraph 3 would have read "determine whether as a matter of construction of clause 2.1(d) Monument is required to pay".

31.
In my judgment, the first question under Issue (1) is to ascertain the meaning of paragraph 3 of the Schedule in its proper context. The starting point is that Tomlin Order has compromised the disputed issues in the Enforcement Proceedings, including Monument's defence based on jurisdiction and stay and has replaced such rights and obligations that arose under the Decision with the rights and obligations arising under the Schedule.

32.
The words in paragraph 3 must be read in the context both of the factual background to the conclusion of the Tomlin Order, known to both parties, as well as the Schedule in its entirety, including its other provisions.

33.
The objective factual background known to both parties includes the following: the Decision; the general law relating to enforcement of an adjudication decision and the limited grounds for resisting enforcement, including the principle of "pay now, contest later", and the principle that a stay on enforcement will only be granted, if the defendant prosecutes any challenge to the decision expeditiously; in the present case, Fairgrove's financial position and the CVA and the fact that Monument wanted protection from an inability later to recover the £50,000, in the event that subsequently it established that it was not liable now to pay the £50,000 under clause 2.1(d); and the nature of the dispute between the parties as to enforcement and that that dispute, due to be heard the next day, was settled by the Tomlin Order. Contractual liability under clause 2.1(d) is not finally determined by the Decision.

34.
Against this background, in my judgment, the purpose of the Tomlin Order was to settle the then existing dispute (around jurisdiction and stay) and to hold the ring to allow Monument to seek to establish by a final judgment that the Adjudicator was wrong on the construction of clause 2.1(d), whilst at the same time catering for the risk that the £50,000 could not be paid back by Fairgrove because of the CVA and to put the burden upon Monument to prosecute its case promptly, if it wished seriously to contest the Decision. Whilst the usual position would be that, if Monument wished to contest the Decision on the construction of clause 2.1(d), it would have had to "pay now and litigate later", because of the CVA and the risk of non-recovery back, the parties agreed to pay the sum into escrow, pending any prompt challenge by Monument. In this way, the Tomlin Order retains the right of

Monument to dispute the Decision as long it brought proceedings promptly. On the other hand, by entering into the Tomlin Order, the parties did not intend to defer to a later date, the issues of jurisdiction and stay raised by Monument in its defence to the Enforcement Proceedings. Contrary to Monument's case advanced by Mr Sahota in the Part 8 Claim, it is not open to Monument to run those defences in those proceedings or at all.

35.
Accordingly, the words "liability to pay the Claimant any sums pursuant to clause 2.1(d)" in paragraph 3 refer to the parties' contractual rights and obligations arising strictly under that clause, namely whether Fairgrove has a contractual right under that clause for immediate payment of the £50,000, regardless of the final account or whether that contractual right is deferred until a final account i.e. the issue referred to the Adjudicator and determined by the Decision.

36.
This construction of paragraph 3 is further supported by the nature and purpose of paragraph 2 b) of the Schedule, which envisages court proceedings and a final court order determining that same question - i.e. entitlement to £50,000 pursuant to clause 2.1(d).

37.
The second question under Issue (1) is to apply that construction of paragraph 3 to the facts i.e. whether the Part 8 Claim is a claim "to determine its liability to pay … any sums pursuant to clause 2.1(d)", as so construed.

38.
I can see some force in Monument's argument that paragraph 3 prescribes no particular form of relief, nor indeed the form of proceedings ("Part 8 or other proceedings"). Further, to some extent, the relief sought in the Part 8 Claim achieves the result which follows from Monument's construction of clause 2.1(d). By implication the declaration sought in the Part 8 Claim is that Monument is not liable to pay unless and until there has been a final account, which would be the result on Monument's construction of 2.1(d) and so implicitly the Part 8 Claim is seeking the relief consequent upon Monument's construction.

39.
However I conclude that in fact the Part 8 Claim does not fall within paragraph 3, for two inter-related reasons:

(1) The proceedings envisaged by paragraph 3 are proceeding to determine - once and for all - entitlement under clause 2.1(d). But the relief sought in the Part 8 Claim (and in any of the formulations put forward by Mr. Clegg in argument) does not seek to, nor will, achieve this. A final declaration as to liability under clause 2.1(d) is not sought. Rather the final relief sought of leaving the £50,000 in escrow "pending the determination of the proceedings" (or "dependent on the progression of the proceedings") leaves matters hanging in the balance. Nor is a final determination sought in any of the evidence put forward by Monument, which instead seeks to resurrect, impermissibly, the defences to the Enforcement Proceedings. Mr. Sahota asked for the sum to be left in escrow for an indefinite future period: see paragraph 18 above. The relief that Monument is seeking in the Part 8 Claim is not the relief that would follow from a final determination, in its favour, on the question of liability under clause 2.1(d). If the relief sought in the Part 8 Claim is granted, that will itself not determine liability under clause 2.1(d).

(2) The paragraph 3 proceedings are those envisaged by paragraph 2 b). The Schedule in general, and paragraph 2 b) in particular, envisage only one of two outcomes of those proceedings:- payment out of the escrow account either to Fairgrove (party entitled to receive) or to Monument (party entitled to withhold). Paragraph 2 b) does not envisage the retention of those funds in escrow pending the taking of the final account. The Part 8 Claim does not seek payment out of the escrow account to Monument.

40.
Monument was put on notice back in October 2021 by Mr Smalley's second witness statement that Fairgrove was contending that the Part 8 Claim did not fall within paragraph 3. It could have, but has not, applied to amend its claim to make clear that it was seeking determination of the clause 2.1(d) issue. Further, to date, Monument has not produced a final account and the relief sought in the Part 8 Claim merely defers resolution of disputed matters between the parties to an unknown date in the future.

41.
Therefore I conclude that the Part 8 Claim are not "proceedings … to determine liability to pay the Claimant any sums pursuant to clause 2.1(d)" within the meaning of paragraph 3 of the Schedule. It follows that, under the terms of paragraph 3, the £50,000 held by the escrow agent must be paid to Fairgrove without set off or deduction.

Issue (2): Determination of the Part 8 Claim

42.
In the light of my conclusion on Issue (1), Issue (2) does not arise for determination. In fact, save to extent that it may be necessary to make some form of order disposing of those proceedings, the Part 8 Claim is otiose, since the funds are to be paid out now in any event.

43.
Nevertheless, I proceed to state my conclusions on Issue (2), had I concluded, to the contrary, that the Part 8 Claim does fall within paragraph 3 of the Schedule.

(a)
Trial now or directions

44.
Fairgrove submits that the Part 8 Claim should be finally determined now, as directed in the 29 October Order. In any event, even if the 29 October Order did not order a trial, this Court has a discretion now to proceed to try the issue. Fairgrove has filed and served evidence in that claim: see Mr Smalley's second witness statement (paragraph 21 above). The issue is one of pure construction of clause 2.1(d) and no further evidence is required. Monument has filed its evidence in support of its claim and has had, but not taken, the opportunity to file evidence in reply to Mr Smalley's statement. Monument is unable to articulate what further documents and evidence might be relevant to the factual matrix relevant to the issue of construction. The Part 8 Claim itself raised no other issues. On this hypothesis, the Part 8 Claim is a claim to determine the issue of construction under clause 2.1(d) and under the rules, Monument has to have already served the evidence upon which it relies to support its case on that issue.

45.
Monument submits that there was no direction for a trial to take place; the 29 October Order does not state that the Part 8 claim is to be "tried" now. Monument asks the Court now to make directions for

the future conduct and trial of the Part 8 Claim pursuant to Practice Direction 8A, paragraph 8.1(2). The present hearing is not the trial of the Part 8 claim; it is a first return date where, in the normal course, directions are to be given. Fairgrove has not addressed the issues raised in Mr Sahota's witness statement.

46.

In the light of this argument at the hearing before me, I allowed Monument to provide the Court with the directions it was seeking, coupled with submissions in support. On 3 December 2021 Monument provided draft directions for the trial of the Part 8 Claim. It seeks disclosure of documents "relating to the background to the Settlement Agreement" by early February 2021, sequential service of witness statements by early March 2022 and for the listing of the trial not before 18 March 2022. In his accompanying submissions, Mr Clegg contends that it was not apparent from Mr Smalley's statement or from Mr Jones' skeleton argument for the oral hearing that Fairgrove would contend that the hearing before me should be treated as the trial of the Part 8 Claim. The need for disclosure and witness statements arises because, in order to undertake the task of construction of the Settlement Agreement (and the Schedule too), the Court must have all the background documents and evidence available. However, Mr Clegg does not identify any particular background documents and evidence (already available to his client or otherwise) nor explain how such material is relevant to the question of construction.

47.

At one stage in argument, Mr Clegg seemed to suggest that the issue in the Part 8 Claim and under paragraph 3 is wider than the pure issue of construction and that "liability" means "practical requirement to pay". However in his additional written submission, he accepted that the issue under paragraph 3 is the pure issue of construction of the Settlement Agreement.

48.

In response Mr Jones submits that the parties have already filed their evidence in the Part 8 Claim in advance of the hearing before me, pursuant to the Part 8 procedure; that, prior to the hearing before me, Monument had not sought any directions (thus undermining its suggestion that it understood that hearing to be for directions only). No explanation has been given of what is comprised in the factual matrix evidence. In any event the directions sought now are disproportionate, given the amount at stake, and given that, at the oral hearing before me, the parties made submissions on the issue of construction and that issue had already been fully argued by counsel before the experienced adjudicator.

49.

In my judgment it is clear from the 29 October Order that the hearing fixed by that order (i.e. that before me) should be the trial of the Part 8 Claim: see in particular paragraphs 4 and 6 of that Order. In any event, even if that is not clear from the 29 October Order, the Court has a discretion at this stage to proceed to trial: see PD 8A, paragraph 8.1(1) and The White Book Service 2021 paragraph 8.09. The issue in the Part 8 Claim is the pure issue of construction of clause 2.1(d) and not some wider issue (e.g. that Monument is not liable to pay the £50,000 even if clause 2.1(d) bears the construction found by the Adjudicator). Even if, as Monument submits, some wider final account or set off issues might arise, I fail to see how those issues can arise in these proceedings beyond the issue of construction. If Fairgrove is right on the issue of construction, then the £50,000 must be paid now, regardless of other claims and the final account. On the other hand, if Monument is right on construction, the £50,000 is not to be paid now and must await the final account; but that final account has not been prepared to date and is not included in these proceedings.

50.

There is no need for disclosure or further witness evidence in order that the Court might determine this issue. Monument has been unable to indicate what further evidence, relevant to this issue, there might be or which it wishes to rely upon, despite having ample opportunity to adduce such evidence or to seek directions in advance of the hearing before me. I would therefore have proceeded to determine the Part 8 Claim under Issue (2)(b) (as below).

(b)

Construction of clause 2.1(d) of the Settlement Agreement

51.

Fairgrove submits that the Adjudicator's conclusion and reasoning is correct. Monument's construction cannot be right, because it could prevent payment ever being made by not agreeing the final account. The purpose of clause 2.1(d) was to protect Fairgrove from a situation where the final account was not issued by the employer and/or not even agreed.

52.

As to what would have happened if the final account had been agreed before 30 April 2020, first if Fairgrove had been the net recipient, it would have been paid, including the £50,000; secondly if Monument had been the net recipient, Fairgrove submits, first, that even in that situation the £50,000 would be required to be paid over to Fairgrove and the words "to be added to the agreed final account" was purely administrative; or secondly and alternatively, there would be a netting off and the first part of the wording about "added" was there to provide an incentive to Monument to get on with the final account.

53.

Monument submits, first, that if the £50,000 is to be paid by 30 April 2020 in any event, then the first part of clause 2.1(d) is meaningless; it is difficult to see the purpose of the words in the first part "to be added"; secondly the words "in any event" apply only to the provisions in relation to the method of payment by bank transfer, whatever amount had to be transferred. Thirdly, Monument relies upon the submissions it made to the Adjudicator (recorded at paragraphs 17 to 24 of the Decision: see paragraph 7 above). Those submissions included the contention that the words "in any event" apply to both parts of clause 2.1(d): see paragraph 22 of the Decision.

54.

I agree with the Adjudicator's conclusion on this issue of construction, for the reasons he sets out in the Decision at paragraphs 41 to 44. In my judgment the words "in any event" apply, and apply only, to the obligation to pay by 30 April 2020. They do not apply to both parts of clause 2.1(d) (i.e. also to the obligation to add to the final account); nor do they apply only to the words which follow them (i.e. to the method of transfer). The latter construction gives no meaning to the words "in any event".

55.

The drafting of clause 2.1(d) is not entirely clear as a matter of grammar, both as to the interrelationship of its two parts and taking account of the opening words of clause 2.1 ("less any amount specified at 2.1(d) below"). I consider the operation of clause 2.1(d) in circumstances (a) where the final account is agreed after 30 April 2020 and (b) where it is agreed before 30 April 2020.

56.

In the former situation, where final account is agreed after (or not agreed by) 30 April 2020, Monument's construction leads to the conclusion that the words "paid no later than 30th April 2020 in

any event” are meaningless and of no effect at all. Yet those words are to be given effect. They govern what is to happen in the event that no final account has been agreed by 30 April 2020. In this regard, I agree with the Adjudicator’s analysis at paragraph 42 of the Decision.

57.
As to the position under clause 2.1(d) where a final account is agreed by 30 April 2020, this may be somewhat less clear. Where that final account shows a balance in favour of Fairgrove, then it is clear that the £50,000 is to be added to that balance, and that sum, at least, has to be paid by 30 April 2020. On the other hand, where the final account shows a balance in favour of Monument, the position is more complex. However I consider that, in that event (which does not arise on the facts here), that balance would be netted off against the £50,000, with the result either that Monument would be required to pay less than £50,000 or even that Fairgrove would be required to pay the balance to Monument . The opening words of clause 2.1 cross-referring to clause 2.1(d), expressly envisage a situation where some or all of the £50,000 will not be payable to Fairgrove at all. This construction gives meaning to the first part of clause 2.1(d). In this way the first part of clause 2.1(d) deals with the position where a final account is agreed by 30 April 2020 and the second part of the clause deals with the position where it not agreed by that date. In this regard, I agree with paragraph 43 of the Decision. The first part is included to encourage Monument “to get on with” the final account and in the parties’ expectation that it would be prepared before 30 April 2020; the second part protects Fairgrove from delay on the part of Monument in agreeing the final account.

58.
For these reasons, had I concluded that the Part 8 Claim constituted proceedings falling within paragraph 3 of the Schedule, I would have made a final determination in those proceedings, pursuant to paragraph 2 b) of the Schedule, that Fairgrove is entitled to the £50,000 pursuant to clause 2.1(d) of the Settlement Agreement and that the funds in escrow are to be paid to Fairgrove.

Conclusions

59.
In the light of my conclusions on Issue (1) at paragraph 41 above, the Fairgrove Application to enforce the Tomlin Order succeeds and there will be orders that pursuant to paragraph 3 of the Schedule the funds held by the escrow agent are to be paid out to Fairgrove now and without set off or deduction. The order will be along the lines sought in the Fairgrove Application, although I will hear the parties as to its precise terms.

60.
I will also hear the parties as to the terms of any order to be made in the Part 8 Claim. As to costs, I note that Fairgrove seeks an order for its costs on an indemnity basis. I will hear Monument on this issue, and both parties on any further consequential matters.