**A**

**B**

**C**

**D**

**E**

**F**

**G**

**H**

Neutral Citation number: [2008] EWHC 231 (TCC)

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**CHESTER DISTRICT REGISTRY**
**TECHNOLOGY AND CONSTRUCTION COURT**

The Castle,

Chester.

Date: Thursday, 7 th February, 2008

Before

MR. JUSTICE JACKSON

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MULTIPLEX CONSTRUCTION (UK) LIMITED

Claimant

v.

CLEVELAND BRIDGE UK LIMITED

First Defendant

AND

CLEVELAND BRIDGE DORMAN LONG LIMITED

Second Defendant

(No. 4)

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Transcript prepared from the official record by

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Mr. R. Stewart Q.C. and Mr. P. Buckingham (instructed by Clifford Chance LLP) appeared on behalf of the Claimant

Mr. A. Williamson Q.C. (instructed by Reid Minty LLP) appeared on behalf of the Defendants

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JUDGMENT

1. MR. JUSTICE JACKSON: This judgment is in three parts, namely Part 1, Introduction; Part 2, Cleveland Bridge's application to amend; Part 3, Decision.

Part 1, Introduction.

2. The factual background and the issues in this litigation have been set out in, amongst others, the following judgments: Multiplex v. Cleveland Bridge [2006] EWHC1341 (TCC); Multiplex v. Cleveland Bridge [2007] EWHC 145 (TCC); Multiplex v. Cleveland Bridge [2007] EWCA Civ 443; Multiplex v. Cleveland Bridge [2007] EWCA Civ 1372. For the purposes of this judgment it is not necessary for me to repeat the factual background or the issues which have been set out in those judgments. I shall take them as read.

3. The principal issue before the court today is Cleveland Bridge's application to make certain amendments.

4. Managing the Multiplex v Cleveland Bridge litigation is a Herculean labour. The particular labour which is in point is number 2, the slaying of the Lernaean Hydra. It will be recalled that each time one head of that grim and ghastly monster was chopped off, two new heads popped up. Just so, in the present litigation, every time the court cuts off one head of dispute by deciding a preliminary issue, at least two new heads of dispute pop up. [See the profusion of pleadings which have followed the various decisions of this court and the Court of Appeal upon preliminary issues, numbers 1 to 11]. Despite that circumstance, the present litigation must be bought to trial and to a final conclusion, at least at first instance. The Hydra must be slaughtered.

5. This event is currently listed for the 3 month period March to May 2008. It is in the public interest and in the interest of the parties that this trial date be held. This litigation has gone on far too long. The parties are incurring excessive costs. The longer this litigation drags on, the greater will be those costs and the more disproportionate they will become to the sums in issue.

6. Two years ago, when giving judgment on certain preliminary issues, I ventured the suggestion that once the questions of principle were resolved (such as which party had repudiated) the parties may wish to seek a commercial resolution of the quantum issues. With a bit of goodwill on both sides and with the assistance of their advisors or a skilled mediator independent of the court, the parties should be able to sort out for themselves all matters of valuation. If that suggestion had been heeded, this litigation could have been brought to a fair and reasonable conclusion during 2006 at a cost which was proportionate to the sums in issue.

7.
In the event, however, that suggestion was not heeded. This litigation has dragged on for a further two years at what I surmise must have become disproportionate cost. There has been a myriad of amendments, re-amendments, re-re-amendments, applications, cross-applications and appeals. When one stands back from the detail and looks at the overall picture, the parties may care to reflect

whether much has been achieved on either side as a result of all these expensive endeavours. But that is a matter for the parties, not for me.

8. It is the wish of the parties that this court should, in effect, value every piece of steel work in Wembley Stadium and every item of damages from the Scott Schedule. I cheerfully undertake this task, because that is the parties' wish and because the parties are entitled to the decision of this court upon the matters in issue. Nevertheless, in discharging this duty I must manage the litigation in accordance with the over-riding objective. That objective is set out as follows in Rule 1.1 of the Civil Procedure Rules, a provision which bears re-reading from time to time:

"1. These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

2. Dealing with a case justly includes so far as practicable . . . .

[b] saving expense, [c] dealing with the case in ways which are proportionate [1] to the amount of money involved, [2] to the importance of the case, [3] to the complexity of the issues and [4] to the financial position of each party; [d] ensuring that it is dealt with expeditiously and fairly; [e] allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases."

9. In the context of litigation which has been rumbling on for nearly four years at disproportionate cost, adherence to the overriding objective requires some firm case management. In particular, I do not think that I should allow non-essential amendments to the pleadings which either imperil the already long postponed trial date or which cause material prejudice to either party in maintaining that date. It was for this reason that on the 21st September 2007 I refused Multiplex's application to amend the Scott Schedule by adding in two new sub-contractor delay claims. It is against this background that I must assess Cleveland Bridge's present application to amend its pleadings.

Part 2, Cleveland Bridge's application to amend

10. By an application notice dated 23rd January 2008 Cleveland Bridge applied for permission to re-re-re-amend schedule 2 of Cleveland Bridge's part of the Scott Schedule. Schedule 2 deals with certain valuation issues arising under the sub-contract and the supplemental agreement. I will read out the principal proposed amendments. After paragraph 50 it is proposed to include the following four new paragraphs:

"50A. CBUK adopts the approach to the valuation of bowl steel set out at paragraphs, 212 to 226 and 247 to 248 of Mr. Underwoods's fourth witness statement dated 20th December 2007.

"50B. The relevant calculations can be found as follows: [a] total net steel actually required for the bowl [1] Spreadsheet titled "Schedule showing the total tonnage fabricated for the bowl on both parties' cases"; [2] Page 1 of the spreadsheet titled 'Calculation of pre 15th February 2004 valuation of bowl steel'; [b] rates per ton of the various stages of fabrication are found at page 2 of the spreadsheet entitled 'Calculation of pre 15th February 2004, valuation of bowl steel'; [c] the valuation of bowl steel fabricated as at 15th February 2004 is found at page 3 of the spreadsheet titled 'Calculation of pre 15th February 2004 valuation of bowl steel'.

"50C. The total valuation of bowl steel up to 15th February 2004 is accordingly £10,407,709.80.

"50D. Further or alternatively CBUK will rely on the methodology using gross weights of steel set out at below"

There then follows the original pleading, setting out a different method of valuing bowl steel.

11. The next significant amendment is to be found immediately after paragraph 104 of this Schedule. The draft amendment reads:

“104.1. CBUK adopts the approach to valuation of the fabrication elements set out at paragraphs 377 to 384 and 392 to 402 of Mr. Underwood’s fourth witness statement dated 20th December 2007.

“104.2. The relevant calculations can be found as follows:

[a] net tonnage included in CBUK’s £12 million scope at pages 1 to 2 of the spreadsheet ‘Calculation of net actual tonnage and lump sum cost post 15th February 2004’; [b] rate per ton at page 3 of the spreadsheet ‘Calculation of net actual tonnage in lump sum post 15th February 2004’; [c] valuation of fabricated steel post 15th February 2004 in the spreadsheet ‘Identification and valuation of quantity of steel fabricated post15th February 2004’.

“104.3. The valuation of steel fabricated post 15th February 2004 is accordingly £5,200,239.46.

“104.4. Further or alternatively, CBUK will rely on the methodology using gross weights of steel set out below.”

12. There then follows the previous valuation of steel fabrication post 15th February 2004, as set out in the pre-existing pleading.

13. The next significant amendment which is proposed follows paragraph 147A in red. The blue paragraph 147A is deleted and we now have a paragraph 148, which reinstates in substance some earlier pleadings and which reads as follows:

“Schedule 3 to the supplemental agreement records the following quantities as being the responsibility of Multiplex. Bowl, Multiplex sub-let 1,023.4 tons; roof Multiplex 4,289.6 tons; PPT Multiplex 1,167 tons; moving roof Multiplex 830 tons, total 7,310 tons.”

This is part of a claim in respect of transporting black steel from CBUK’s yard to Fulham.

14. In addition to those paragraphs which I have read out, there are consequential amendments to the figures of the kind one would expect through the rest of the schedule. It can be seen from paragraphs 50A and 104.1 that Cleveland Bridge proposes to add to its pleading a new method of valuing the steel work carried out. This involves incorporating by reference large sections of Mr. Underwood’s witness statement into the pleadings. The new method is explained across many pages of Mr. Underwood’s statement, which range some way beyond the specific paragraphs which are to be incorporated into the pleadings.

15. The proposed amendments have a significant financial effect. The amendment in relation to the valuation of bowl steel up to 15th February 2004 increases that head of claim by approximately £650,000, because the figure of £10.4 million replaces an earlier figure of £9.76 million. The amendments in respect of fabrication after 15th February lead to an increased claim of about £900,000. Those two figures make a total prima facie increase of approximately £1.55 million. However, deductions then fall to be made elsewhere in the pleadings, which lead to an overall increase of Cleveland Bridge’s claim in respect of steel works by about £1.2 million. It should be noted that the new approach to calculating and valuing steel work is additional to, not in substitution for, the methods which are already pleaded and which are preserved.

16. This is the application to amend which, as I say, was initiated on the 23rd January and is being heard today on the 7th February, just under one month before the trial commences. I must now decide upon that application.

Part 3, Decision

17. I have heard cogent oral arguments today from Mr. Adrian Williamson Q.C. for Cleveland Bridge and Mr. Roger Stewart Q.C. for Multiplex. In addition, I have had the benefit of full skeleton arguments which I received yesterday and I have been able to consider.

18. I am quite satisfied, both from counsel's submissions and from the evidence which has been lodged by Mr. Fenn and others on behalf of Cleveland Bridge and by Mr. Mastrandrea and Mr. Panayides on behalf of Multiplex, that if these amendments are allowed they will substantially disrupt the orderly preparation for trial. Substantial additional work will be generated for the experts. The nature of that additional work is set out in Mr. Mastrandrea's witness statement. Significantly, he says in paragraph 29:

"In the time available to me I am simply unable to address both CBUK's currently pleaded case and Mr. Underwood's alternative valuation which raises as many questions as it answers."

19. It has become clear, as counsel have debated the proposed amendments, that there are many unanswered questions which will have to be followed through, in the event that the amendments are allowed. The scope of the trial will self-evidently be increased, because Cleveland Bridge will be putting forward two different valuation methods and approaches in respect of the bowl steel work. One important unanswered question is why it is that these two different methods, both of which Mr. Underwood asserts to be correct, should result in a difference of £1.2 million. Presumably it could be said that one or other method might be wrong to that extent. The question will then arise as to which of those methods is wrong and why and how the difference of £1.2 million can be accounted for.

20. I am satisfied that if these amendments are allowed there will be substantial prejudice to Multiplex. Mr. Panayides in the first instance addresses this in his witness statement at paragraphs 14 to 17 and Mr. Stewart has developed this matter in his submissions this morning. It is clear that the amendments will impact not only upon the expert evidence but also upon the factual evidence. If the amendments are allowed there will need to be substantial additional cross-examination both of Mr. Hall and of Mr. Underwood about the issues arising from the new case.

21. It also seems to me that if this new case is allowed in, it will have a material impact on the length of trial. The parties will have to address two different approaches to valuing the steel work of the bowl, which is a significant part of this already very substantial trial, and both of the methods will have to be explored.

22. Mr. Williamson has on previous occasions, when the boot was on the other foot, stressed the sheer volume of work which requires to be done by both parties (and in particular by his own clients), in order to be ready for a trial starting on the 3rd March of this year. He has made the point that both sides are fully stretched in terms of work and preparation in order to meet that date. It seems to me that if these amendments are allowed the amount of preparatory work will be substantially increased. Mr. Mastrandrea will have to do his best in difficult circumstances and produce a further expert's report. The lawyers on both sides will then have to deal with that. The issues arising, as I say, will give rise to additional cross-examination and all these matters must be taken on board by all participants in the trial. The trial is due to start in less than one month's time. If the amendments are allowed,

there will be additional issues to be decided at trial. This is already a trial which involves a huge number of issues, all of which are to be argued and determined within a period of only 3 months.

23. I should add that the amendments could well imperil the start date of the 3rd March. Indeed they might imperil the completion date of the end of May. If the trial slot of March to May is lost, there would be substantial listing difficulties and I do not know when this case would be heard.

24. Having regard to the circumstances of this litigation and all the considerations set out above, in the exercise of my discretion I refuse Cleveland Bridge's application to amend in respect of paragraphs 50A to D and paragraphs 104.1 to 104.4 of Cleveland Bridge's schedule 2. I also refuse to allow those amendments to figures which are parasitic upon those paragraphs.

25. I turn now to paragraph 148. Mr. Panayides at paragraph 5 of his witness statement indicated opposition to that amendment. However, I am not persuaded that this amendment will cause undue prejudice to Multiplex. It seemed to me on pre-reading the papers that, tiresome though the amendment may be, Multiplex would be well able to deal with that amendment by the start date of trial without suffering undue prejudice. When I put this point to Mr. Stewart at an early stage of today's argument he accepted that that was the case. I consider that the proposed amendment to paragraph 148 and any parasitic amendment to the figures elsewhere which flow from that should be allowed. Accordingly, I allow the application to amend to that limited extent only.