Neutral Citation Number: [2013] EWHC 2923 (TCC)

Case No: HT-13-327

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25 September 2013

Before:

THE HONOURABLE MR. JUSTICE COULSON

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Between:

Stella Willis **Cla**

- and -

(1) MRJ Rundell & Associates Limited

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(2) Grovecourt Limited

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Jonathan Selby (instructed by **Olswang**) for the **Claimant**

Luke Wygas (instructed by **Cameron McKenna**) for the **Defendant**

Hearing date: 25 September 2013

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Judgment

The Hon. Mr. Justice Coulson:

1. INTRODUCTION

1.
This is a case to which Practice Direction 51G (Costs Management in the TCC) applies. This judgment follows a costs management hearing which I ordered at the adjourned case management conference in July. The debate has focused on the overall amounts of the parties' respective costs budgets. I apprehend that the outcome will not be uncommon under either PD 51G, or the new costs budget rules which came into force in April 2013.

2. BACKGROUND

2.
Following the resolution of the dispute between the claimant and Grovecourt Limited, the second defendant, this case now proceeds against the first defendant only. They are a firm of construction professionals. The claims concern building works carried out to the claimant's property in Notting

Hill. The principal claims were threefold. First, there were claims for the cost of rectifying defects, which were originally pleaded in the sum of about £480,000 odd, together with a claim for alternative accommodation costs. The second was a claim for overpayment of monies to Grovecourt, the contractor, by way of VAT, in the sum of £335,000. The biggest claim of all, for some £617,000 odd, was in relation to alleged overpayment of monies to Grovecourt for the works themselves.

3.
In the course of his submissions, Mr Selby, on behalf of the claimant, explained that the overpayment claim broke down into three parts. First, there were the additional costs because of what is alleged to be the unsuitable form of contract. Secondly, there were the claims that various elements of the contractor's claim had not been justified or supported by reference to invoices and the like. Thirdly, there were criticisms of the first defendant's approach to valuation generally which, so it is said, led to significant overpayment.

4.
The total value of the claim originally pleaded was in the order of £1.6 million. But this has now been reduced. The VAT has been repaid by Grovecourt, save for about £5,000 odd. It appears to be accepted by the claimant that the proposed remedial works could be carried out in a different way, thereby reducing the cost and the total value of the remedial work claim to around £250,000, together with the claim for the costs of alternative accommodation. In this way the total value of the claim is now put at a maximum of about £1.1 million. Accordingly, by the standards of most litigation in the TCC, the sums claimed are relatively modest.

5.
The original case management conference took place on 14 December 2012. I set a timetable for the case, with the trial fixed for early October 2013. At that hearing each side produced a costs budget. The claimant's costs budget was in the sum of £821,000 odd together with VAT and the defendant's cost budget was in the sum of £616,000. I expressed the view on that occasion that, in the context of a claim worth £1.6 million at most, those figures were high and appeared disproportionate. There was however, insufficient time on that occasion for the detail of the costs budgets to be explored any further. Neither side chose to bring the matter back to court.

6.
As envisaged at the CMC, the parties have engaged in mediation. This took place in June. Without wishing to be overcritical, it appears that the mediation led the parties to ignore completely the timetable that I had set. In consequence, there was almost total non-compliance by both sides with the directions of 14 December 2012. At what would otherwise have been the Pre-Trial Review in July, I therefore had no option but to adjourn the trial. By then, the parties were simply not in a position to do all that they had not done and be ready for an effective trial in October. For the avoidance of doubt, I should say that, on the material before me, an adjournment would always have been required in July, even if a costs management order had been made in December.

7.
Of course, I was aware that an adjournment, even one that was inevitable and therefore uncontested, was going to increase the costs. Because of my original concerns about the cost budgets, and because of the adjournment and the consequential increase in costs, in July I ordered that there should be a case management hearing today devoted solely to costs management.

8.

For today's purposes, both parties have provided updated costs budgets. Both of those indicate an increase in estimated costs. The claimant's costs budget is now in the sum of **£897,369.67** plus VAT. The defendant's costs budget, which does not include VAT (because that would not be recoverable by the claimant), is in the sum of **£703,130.37**.

3. PRACTICE DIRECTION 51G

9.
The relevant parts of 51G PD are as follows:

"1.2

In this Practice Direction 'costs management order' means an order approving the costs budget of any party to the proceedings, after the court has made any appropriate revisions.

1.3

The court cannot approve costs incurred before the date of the first costs management order, but the court –

(1) may record its comments on those costs; and

(2) should take those costs into account when considering the reasonableness and proportionality of all subsequent costs…

4.1

The court will seek to manage the costs of the litigation, as well as the case itself.

4.2

The objective of costs management is to control the costs of litigation in accordance with the overriding objective. (See rule 1.1.)

4.3

At any case management conference or pre-trial review, the court will have regard to any costs budgets filed pursuant to this Practice Direction and will decide whether or not it is appropriate to make a costs management order.

4.4

If the court decides to make a costs management order it will, after making any appropriate revisions, record its approval of a party's budget and may order attendance at a subsequent costs management hearing…in order to monitor expenditure."

10.
Before embarking on a short analysis of the costs budgets themselves, I should say that I understand that costs budgeting is a regime still very much in its infancy. It is not for the court to penalise unduly litigants, or their solicitors, merely because some of the particular aspects of costs budgeting may be unfamiliar or even counter-intuitive. But costs budgeting is an important tool by which the courts will endeavour to control the costs of civil litigation, and it is therefore important that all litigants and their solicitors get to grips with and comply with the new regime as soon as possible.

4. PROPORTIONALITY

11.
As noted above, the claim now has a maximum value of £1.1 million. The total amount of the costs in the costs budgets (excluding VAT on the claimant's costs), is about £1.6 million. In other words, it will cost significantly more to fight this case than the claimant will ever recover. On that basis alone, it seems to me that the costs in the costs budgets are both disproportionate and unreasonable. During the course of his helpful submissions, Mr Wygas argued that, as a result of the comparison between the costs figure and the amount at stake, the claimant's costs were indeed disproportionate. In my view, there is insufficient difference between the two costs budgets to mean that the defendant's costs could be characterised in a different way.

12.
In reaching that conclusion, I accept that a professional negligence claim of this kind can involve costs that other commercial disputes may not. For example, in a professional negligence case, expert evidence will almost always be necessary to demonstrate that a professional fell below the standard required. Furthermore, there also needs to be an allowance, in any consideration of the proportionality of costs, for the non-quantifiable, but potentially serious, damage to the defendant's professional reputation that may be caused by a claim of this kind.

13.
But even making due allowance for both these factors, I do not regard the budget costs figures in this case as proportionate or reasonable, particularly given the relatively limited nature of the disputes between the parties. The individual dispute which is worth the most is the overpayment/overvaluation claim. That will involve some quantity surveying evidence, although experience of such disputes leads me to suspect that this will not necessarily be extensive: the various valuation items in issue will probably fall into a handful of types or categories, so that once an expert has addressed the leading items in each category, there will be little left for the expert to do. The defects are a relatively modest element of this claim, so that even if they required both M and E and architectural experts, the involvement of such experts ought to be relatively limited.

14.
As I put to the parties during submissions, it seems to me that one test of proportionality is whether the trial is likely to be an end in itself, or merely a lesser part of the process which the parties will use in order to put themselves in the strongest position to argue that, subsequently, the other side should pay all or most of their costs. When the costs on each side are much higher than the amount claimed/recovered, the latter is almost inevitable. I have no doubt that that will be the case here. For those reasons, therefore, I conclude that the costs shown in the costs budgets are disproportionate and unreasonable.

5. PARTICULAR ELEMENTS OF THE BUDGETS

(a)
Introduction

15.
I should make plain, before dealing briefly with some of the particular elements of the budgets, that whilst the defendant makes criticisms of the claimant's costs budget, the claimant does not criticise the defendant's overall budget figure (although Mr Selby very properly warned that that is not to be taken as accepting the particular line items within that budget). That means there was no argument advanced by the claimant as to any particular inadequacies or overstatements which may exist within the defendant's budget costs, which makes any sort of sensible assessment of the figures just about

impossible. Furthermore, although Mr Wygas made criticisms of the claimant's costs budget, these were general, not specific. He was also hamstrung because, save for a few line items, the defendant's own costs are very similar to those of the claimant. Again, therefore, there was a complete absence of any alternative figures which I could use for a reduced, but approved, costs budget.

16.
Also by way of caveat, it is important to note that large sums within the costs budgets, particularly within the claimant's costs budget, have already been incurred. Those, therefore, cannot be the subject of a costs management order (see paragraph 1.3 of the PD), although of course they can be the subject of comment.

(b)
Costs Already Incurred

17.
In relation to specific items of cost which have already been incurred, I note that the claimant is said to have incurred over £300,000 before the first CMC in December 2012. There is nothing in the material before me to suggest that such a large spend was proportionate or reasonable. There is no breakdown of that figure, but it seems to me, given the relatively straightforward disputes in this case, that it is much too high. That is reinforced by the fact that there was no pre-action mediation.

18.
Another item of cost, which has also been now incurred, relates to disclosure. The claimant's figure is put at over £100,000. Again I find that such a figure is disproportionate and unreasonable. In a case where the overvaluation/overpayment dispute centres on an alleged absence of documents, and where there are defects said to have been found post-contract rather than during the building works, extensive disclosure is not warranted. That view is borne out, I think, by the witness statements which I have studied, and which are very light in their references to contemporaneous documents. I should add that this criticism of the claimant's costs incurred on disclosure applies a fortiori to the defendant's figure for the disclosure exercise, which is in the even higher sum of £131,000.

(c)
'Incurred/Estimated'

19.
Some items within the claimant's budget are said to be both incurred and estimated, without it being clear which is which, and without any breakdown of either. I do not consider that to be satisfactory. To allow a proper analysis, in order for the court to make a costs management order, the costs which have been incurred (and which therefore cannot be the subject of an order) must be separated out from those which are estimated (which can be the subject of an order).

(d)
Expert's Costs

20.
The claimant's experts' fees, which are one of those items said to be both incurred or estimated, without there being a proper breakdown, are put at £100,000 before any account is taken of their involvement at the trial. Again, that seems to me to be disproportionate and unreasonable. Whilst some expert assistance will be required, for the reasons previously noted, I think that it is unlikely to be extensive. I would have expected to see a figure something like half the amount actually included

in the costs budget. Unhappily, my recent experience is that the amount of the experts' fees in cases like this is often out of all proportion to the assistance provided.

(e)
Contingent Costs

21.
The claimant's budget includes a large lump sum (£54,590), which is not further broken down, for contingent costs. It seems to me that, whilst budgets of this sort can include contingent sums, it needs to be made very clear what those contingency sums are for and how they have been calculated. For example, it may be appropriate to put in, as a contingency sum, the estimated additional costs of written submissions, if the original budget assumed that oral submissions would be made at the end of the trial. Another example would be a contingency sum for any application for security for costs.

22.
It is not appropriate, as appears to have happened here, to put in a single lump sum by way of a contingency figure and leave it at that. Although common in the building industry, the inclusion of such a sum promotes less rather than more certainty, and is therefore not in accordance with the recent rule changes to the CPR. In the underlying material, some explanation has been given as to why this figure has increased (because it is said that some money has been spent on items which were not envisaged). I consider that such items ought to be included in the relevant line items as a cost incurred. For example, it is said that there is an additional cost because of the need to amend the pleadings. That ought to be shown as an additional cost under the relevant line item within the costs budget.

(f)
Settlement Costs

23.
Another lump sum in the budget is for settlement costs (£70,400). Again it seems to me that this ought to be broken down by reference to its component parts: it is impossible to see how such a large sum has been arrived at. Although it is said that the claimant's budget costs in relation to settlement have increased to £70,400, it is also not clear how and why that increase have come about. It cannot be explained by the mediation in June, because it was always envisaged that there would be mediation at the outset of these proceedings. Again, therefore, this figure appears disproportionate and unreasonable.

6. ALTERNATIVE FIGURES

24.
Of course in an ideal world, the court would be able to provide alternative figures for those estimated items in a costs budget which the court considers to be too high. The alternative figures could then be included in an approved costs budget and a costs management order could be made. But as I have already noted, I have nothing on which I could rely in order to come up with reasonably accurate alternative figures. I do not consider that it is appropriate for the court to impose its own figures without notice and without any supporting material.

7. CONCLUSION

25.

In all those circumstances, I expressly decline to approve either party's costs budget. For the reasons I have given, I consider them to be disproportionate and unreasonable. I therefore have no option but to decline to make a costs management order. And, whilst I could order the parties to return at an adjourned hearing with new budgets, I am concerned that there is much work that the parties need to be getting on with in order to be ready for the trial at the end of the year, and I am anxious not to increase the costs burden any further. In addition, of course, any new budgets would show increasingly higher figures for costs incurred, and lower figures for estimated costs, making any costs management order less and less effective. I will therefore require the parties to keep their costs budgets up to date, and to provide them to the court at the PTR, but I do not think it is productive to order a further hearing simply to consider further costs budgets.

26.
Of course, my adverse comments on the amounts of both parties' costs budgets will become relevant at the end of the case when the issues as to the amount of any costs to be recovered by the successful party will have to be decided. In the light of the views expressed above, it must be likely that, at that stage, even the successful party will recover only some of its costs. However, I should add that, although I am aware that some have taken the view that the absence of an approved costs budget means that that party will recover no costs at all, I do not believe that such a draconian approach is in accordance with the letter or the spirit of the new costs rules or 51G PD. Just because an estimate of costs of £900,000 at this stage of the case appears disproportionate and unreasonable does not mean that a final recovery of, say, £450,000, by agreement or on assessment, would not be appropriate.

27.
I appreciate that this is an unsatisfactory result. The whole point of costs management is for the court to make orders so as to assist the parties to keep costs to a reasonable level. But in the circumstances of this case, I hope as I have explained, it is not possible for there to be any other outcome. I am, however, very grateful to both Mr Selby and Mr Wygas for their assistance.