Neutral Citation Number: [2014] EWHC 2604 (TCC)

Case No: HT-13-455

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30th July 2014

Before:

MR JUSTICE AKENHEAD

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Between:

McLENNAN ARCHITECTS LIMITED **Cla**

- and -

(1) JEREMY JONES (2) HELEN ROBERTS **Defe**

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Emyr Gweirydd Jones (instructed by **Berry Smith LLP**) for the **Claimant**

Alexander Hickey (instructed by **Dentons UKMEA LLP**) for the **Defendant**

Hearing dates 24 July 2014

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JUDGMENT

Mr Justice Akenhead:

1.
There are two applications before the Court in these relatively low value proceedings, the first relating to provision for access for an IT expert to examine a computer and secondly an application by the Defendants, Mr Jones and his wife Ms Robert, for security for costs. The claim by the Claimant, McClennan Architects ("McLennan"), is for payment in relation to architectural and project administration services as well as for work as a contractor provided or done for the Defendants, at their home, 16 Staverton Road, Oxford ("the Property") This claim is for £235,875.54. That is disputed by the Defendants who also counterclaim for £325,544.33 in relation to breach of contract on the part of McLennan. The Defendants' cost budget estimate is for some £316,000 whilst McLennan's is for some £201,000. It can readily be seen that, if these cost estimates are reasonably accurate, the costs will broadly equate to what is in issue.

The Background

2.
Mr McLennan has known the Defendants for some time, initially socially. Mr Jones, largely if not entirely, owns a company, Jeremy Jones Associates Ltd ("JJA") which has business interests which

include consultancy and political work in Oman. The Defendants engaged McLennan in 2000 or 2001 initially to provide architectural and possibly other services at 19, St Margaret's Road, Oxford; no issue arises about these services in the current proceedings. In about 2005 Mr Jones introduced Mr McLennan and his company to an Omani family the Al Bu Saids for whom McClennan did work in 2005 and 2006, possibly going into 2007. There is an issue as to whether McLennan were fully paid by the Al Bu Saids at or about that time.

3.
In late 2010, McClennan was engaged by the Defendants to provide architectural and contract administration services in respect of the Property in relation to which the Defendants wished to carry out extensive further work. It is pleaded by McClennan that, although this engagement was partly evidenced in writing there was also oral agreement that "payment for the architectural services would be deferred for as long as the money from Oman in respect of the debt of RO85,000 continued to be paid" (Paragraph 12(c) of the Particulars of Claim). It is suggested that this related to the fact that there was owed to McLennan from one of the Mr Al Bu Saids that sum. It is asserted that it was agreed that invoices would be presented by the Claimant addressed to JJA "for work carried out in Oman in line with the quantum of work carried out by the Claimant in respect of" the Property. McLennan goes on to assert that "upon the completion of the work in respect of the property and/or upon the cessation of payments in respect of the Oman work the fees due to the Claimant in respect of the architectural services would become available" (Paragraph 12(e)). It is not pleaded and not really explained why any of this was necessary.

4.
It seems to be common ground that there came a time when McLennan took on the role effectively of contractor following the termination of the first main contract. The parties however appear to have fallen out in or about March 2012.

5.
McLennan issued these proceedings in the Northampton County Court (online) either in late 2012 or early 2013. The Particulars of Claim are dated 25 January 2013 and the Defence and Counterclaim 25 March 2013. The Reply and Defence to Counterclaim was served on 10 May 2013. The proceedings then went in to a procedural limbo, being transferred initially to the Oxford County Court and later being transferred from there to the Bristol TCC. HHJ Havelock-Allan QC ordered on 28 November 2013 that the matter be transferred to the Judge in Charge of the TCC in London to decide whether the case should be dealt with in the High Court or at the Central London County Court. The Judge in Charge determined in early 2014 that it should remain in the High Court and the matter came on for its first CMC before Mrs Justice Carr in March 2014 with directions being given through to trial in November or December 2014. Various steps have been taken and, for instance, there has been disclosure, although whether this is complete I can not say at this stage.

6.
In mid-April 2014, McLennan’s solicitors prepared and issued an application seeking the granting of access for its IT expert to the Defendants’ electronic devices to investigate and report on the creation and parts of specific e-mails ("the IT Expert Application"). This application was only sealed on 19 May 2014. Directions were given by Mr Justice Ramsey that the Defendants should serve evidence by 3 June 2014 and that there should be a hearing on 12 June 2014. The parties however decided, sensibly, to attempt to resolve their disputes amicably. Unfortunately, this did not succeed and so it is that the IT Expert Application was and is pursued. A new date of 17 July 2014 was fixed but by then it had clearly emerged that the relevant laptop was not owned by the Defendants as such but by JJA and

that, therefore and given the time constraints, it would be better to re-fix the date at a time when both Counsel were available and also the Defendants' application, issued on 16 July 2014, for security for costs ("the Security Application") could be heard.

The Pleadings and the "Fraud" Allegation

7.
McLennan's claims are made by reference to five invoices, some of which were expressed to relate to work carried out in Oman but which are said to be "in line with the quantum of work carried out by the Claimant in respect of the Property", said to have been submitted in line with the oral agreement relied upon by McLennan.

8.
They are disputed by the Defendants on a number of grounds in their Defence and Counterclaim. They assert that the original retainer provided for fees to the Claimant was 12.5% of the net construction cost plus VAT (Paragraph 12), albeit that this was by reference to a fixed budget of £580,000 (exclusive of VAT (Paragraphs 18 and 20). In answer to an assertion that there were agreed further changes in the fees agreed in April and December 2011, the Defendants say that much of this was never agreed, that one actual or possible entitlement of £3,500 for garden design was paid but only a small amount of work was done before it was omitted and that therefore it should be repaid. The Defendants accept that the first main contractor, BPJ, was dispensed with in or about August 2011 and that McLennan took over the building works as contractor in early September 2011 but that the agreement was that McLennan was to be paid a percentage fee of 20% for management, overheads and profit on sub- contractors, materials and labour (with some exceptions) but this percentage was to be based on a construction cost limited to the budget. It is said that there was no or no adequate project management or reporting by McLennan. In answer to an assertion that there was repudiation by the Defendants of the contract or varied contract between them and McLennan, it is said that there was agreement that the relationship should come to an end (Paragraph 36).

9.
Between Paragraphs 40 to 49, the Defendants address the invoicing relating to Oman. They assert that McLennan had already been paid in full for the services which it had carried out for the Al Bu Saids and that there was no agreement as alleged for the deferment of payments for services provided by McLennan in connection with the Property. They assert that Mr McLennan suggested to Mr Jones in early November 2010 that "the Claimant wanted to be able to show an international work profile for the Claimant's practice" and to that end Mr McLennan "suggested that it would assist [McLennan] if it could invoice sums for services carried out in respect of the Property in Oxford as if they were for services rendered in Oman" (Paragraph 42). They say that McLennan invoiced them for £108,688.79 purportedly for work carried out in Oman and 23 invoices are listed (Paragraph 43). They say that these invoices were all false because they were really claims for McLennan services for the Defendants. They say that McLennan should have charged and accounted for VAT and that the false invoices were raised by McLennan with the "object and effect of defrauding her Majesty's Revenue and Customs of liability for VAT" (Paragraph 44). It is said that documents attached to the Particulars of Claim which purports to corroborate the arrangement relating to the "Oman" invoices were forgeries (Paragraph 46). In respect of one e-mail purportedly dated 18 December 2006, it is said that this cannot be correct because it refers to a cyclone (Cyclone Gonu) which did not occur until June 2007; as to an e-mail dated 11 November 2010 embedded in an e-mail dated 26 November 2011 purportedly from Mr Jones to Mr McLennan, this is said to be a forgery. In Paragraph 47, it is asserted that "Mr Jones acquiesced in Mr McLennan's scheme…because he wanted to help Mr McLennan" and

that he now "realises he was duped by Mr McLennan into participating in a VAT fraud". It is asserted that the Claimant has already paid the sum of £108,688.79.

10.
The Counterclaim relate to breaches of contract alleged against McLennan to the effect that McLennan caused, allowed or permitted an overspend of £290,000 odd and that there was defective work to the tune of £60,000. This produces a total counterclaim in the sum of £325,544.33.

11.
The Reply and Defence to Counterclaim challenges much of what the Defendants have pleaded. In relation to the Oman invoicing, the Defendants' case is challenged in trenchant terms, for instance in Paragraph 24: "...the suggestion that a trail of invoices would assist the Claimant to obtain international work, which by that time it was not seeking, is absurd." The Counterclaim is addressed in fairly short order with clear denials saying, amongst other things, that if there were any losses occasioned to the Defendants by employing others to finish the work they are "a product of their own breach and irrecoverable" (Paragraph 33).

The Security for Costs Application

12.
This is supported by witness evidence from the Defendants' solicitor. There is now no issue that the relevant company threshold for ordering security has been established. This is clear from the filed balance sheet accounts which show broadly that over the last seven years McLennan has only had a net worth of no more than about £45,000-£46,000. Indeed evidence was filed of the management accounts for McLennan's 2013-14 trading year which shows that the budgeted retained profit before tax was about £100,000 but based on the figures for Month 11, a net loss of some £10,000 was anticipated. In terms of turnover, the turnover up to Month 11 was £100,000 less than the £125,000 budgeted for the year. This shows that this company is likely to be barely solvent, given that the balance sheet is related largely to sums due and owing.

13.
Much was made initially by McLennan's solicitors in their evidence about the applicability of ATE insurance. McLennan is funded in this litigation in effect by Conditional Fee Agreements both with its solicitors and Counsel and it was backed up by a "Recourse Policy Document" provided by ARAG Legal Services which provides £100,000 cover for disbursements (such as payments due to experts) and the Defendants' costs. However, it contains various let-out clauses and, as revealed by a witness statement dated 23 July 2014 from Ms Laviers of McLennan's solicitors, ARAG withdrew this cover as at 8 July 2014. She understands that ARAG will provide cover of any award of costs made to the Defendants in relation to their costs incurred up until 8 July 2014. ARAG also by Condition 8 of the policy declare that, if the insured makes "a claim which is a fraudulent or false, this policy shall become void and all benefit under it will be forfeited." Mr Jones, Counsel for McLennan, did not orally press the utility of the possible availability of ATE cover even up until late July 2014, albeit that there were references to this in his written submissions. I cannot see that significant weight can be given to this ATE factor because, as is properly accepted by both parties, there is a reasonably arguable issue about fraud in this case in relation to the deployment of the "Oman invoicing" and, if this issue is established in favour of the Defendants, that might enable ARAG to treat the policy as void and unenforceable even in relation to cover up to the time that it withdrew the cover in early July 2014.

14.

There is no doubt that, once the threshold has been established, the Court has a discretion as to whether to order security for costs and if so, in what amount and whether such security should be provided in tranches. Peter Gibson LJ in **Keary Developments Ltd v Tarmac Construction Ltd** [1995] 3 All ER 534 highlighted the relevant principles starting at page 539:

"The relevant principles are, in my judgement, the following.

1…the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security…

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which had been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiffs impecuniosity…But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company...

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure…

5. The court in considering the amount of security that might be ordered would bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount…

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled…

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons…"

15.
There are three points which go primarily to the amount of any security to be ordered. The first is the delay (if such it can be described) in the bringing of this application. The Civil Procedure says in the notes (Paragraph 25.12.6) that applications for security for costs should be made promptly as soon as the facts justifying the application are known. However, I would not criticise the Defendants for any delay, whilst acknowledging that in theory the application could have been made whilst the case was still in the County Court. There was a genuine hiatus from mid-2013 to about March 2014 (which, so far as I can tell, was neither party's fault) as to where the case was to be ultimately case managed and tried. From about March or April 2014, it was and must have been clear to McLennan and its solicitors that an application for security was contemplated; there was a desultorily but continuing exchange of communications between solicitors in relation to the size and availability of the ATE

insurance to cover the Defendants' costs; for instance, McLennan's solicitors were telling the Defendants' solicitors that it was seeking an increase on the £100,000 cover provided by the ATE insurance. The latter half of May and June 2014 were taken up in the parties mediating through the Court Settlement Process. I therefore do not consider that it is appropriate to reduce any security to be ordered to reflect the delay.

16.
The second matter raised is to do with the extent to which if at all the costs of indication by the pursuit of the Counterclaim should come into the equation at all in terms of any security ordered. In **Dumrul v Standard Chartered Bank** [2010] EWHC 2625 (Comm), Hamblen J said:

"5. As a general rule, the Court will not exercise its discretion under CPR Part 25 to make an order for security of the costs of a claim if the same issues arise on the claim and counterclaim and the costs incurred in defending that claim would also be incurred in prosecuting the counterclaim - see BJ Crabtree v GPT Communication Systems (1990) 59 BLR 43 ("the Crabtree principle").

6. In the Crabtree case, the claimant was a building contractor which claimed £78,000 for additional works which it said it was instructed to undertake by the defendant. The defendant denied the claim on the basis that it had not authorised the variation to the programme of works, and also (additionally) counterclaimed damages of £105,000 for the cost of rectifying defective work and completing uncompleted work. In that case, Bingham LJ said (at p6-7):

"It is, however, necessary as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy -- that in the course of defending the counterclaim all the same matters as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation…

It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim."

7. As stated by Park J in Anglo Petroleum v TFB [2003] EWHC 1177 , where the issues before the court would be substantially unaffected by the trial of the counterclaim without the respondent's claim, an order for security will generally be inappropriate. In that case, the judge said, at §32-33, that where:

"… A [the respondent] could, and presumably would, defend B's [the applicant's] claim by advancing essentially the same arguments as those which he, A, wanted to advance in his own claim. It would in my view be largely pointless for the court to have ordered A to provide security for the costs of his own claim.

In general, the courts recognise that, where there are cross-proceedings, the position is as I have described, and the courts do not order a person in the position of A to provide security for the costs of the claim he is making himself."

8. Not every case in which there is a claim and counterclaim falls within the Crabtree principle. In particular:

(1) Where the claim raises substantial factual inquiries which are not the subject of the counterclaim, an order for security may be appropriate notwithstanding the fact that the claim provides a defence to the counterclaim: see Shaw-Lloyd v ASM Shipping [2006] EWHC 1958; Newman v Wenden [2007] EWHC 336 . In those circumstances, an order for security will normally be limited to the costs of addressing additional issues raised only by the claim.

(2) In cases where the claim and counterclaim raise additional issues, it may also be relevant to consider whether the quantum of the claim in respect of which security is sought is substantially greater than the applicant's claim: see Newman v Wenden; Hutchison Telephone v Ultimate Response [1993] BCLC 307.

17.
In essence and in this case, the Court in the **Crabtree** context needs to consider whether the claim “raises substantial factual inquiries which are not the subject of the counterclaim” and whether “the claim and counterclaim raise additional issues” (see Paragraph 8 of the **Dumrul** judgment above). In my judgment, the claim made by McClennan does raise serious and substantial factual enquiries which are not the subject of the Counterclaim and that the claim and counterclaim to a significant extent raise different issues. The most obvious issue on the Claim is the Oman invoicing arrangement. It is legitimately accepted by both parties that there is serious triable issue: was some £108,000, almost half the claim, actually paid by the Defendants for the services provided by McLennan for them or for services provided some years before by McLennan for one of the Mr Al Bu Saids? This is a straight defence but it raises substantial and complex issues of fact. It is not part of the Counterclaim, nor could it be. There are other factual defences which do not feature in the Counterclaim such as whether services and/or work were actually provided and what the value of the services provided actually was as well as whether there was a restriction on any percentage recovery related to the alleged budget cost. Whilst I can see, and indeed it is accepted by Mr Hickey on behalf of the Defendants, that in terms of quantification of the security, the Court needs to strip out the Counterclaim costs, this is the case which, on analysis therefore (subject to that stripping out), does not fall within the **Crabtree** principle.

18.
Finally, Mr Jones for McLennan argues that his client’s genuine claim will be stifled if any or any substantial security for costs is ordered against it. Ms Laviers in her fourth witness statement for the Claim says that her client can provide security for £20,000 within the next 28 days but it has not had much of an opportunity to explore its options. In that latter context, I am asked to take into account the fact that the application was issued on 16 July 2014 and the hearing occurred eight days later, it being inferred, I assume, that McLennan has not had enough time to work out what security can be raised from a number of sources. Mr Jones in argument said that he had instructions as to Mr McLennan’s means and that he had a list of assets which he could proffer to the Court (with his client in court able to explain and justify it); objection was taken to this by Mr Hickey because his client would not have sufficient time to respond to it. I indicated that in those circumstances it would be appropriate to submit this evidence but that it might be appropriate to give the Claimant permission

to apply to serve such further evidence and to seek to have the security for costs order mitigated or reduced.

19.
There is no real evidence therefore before the court at this time to show that McLennan's claim would actually be stifled. I bear in mind the observation of Peter Gibson LJ in the **Keary Developments** case that the court should consider not only whether McLennan "can raise the amount needed from its directors, shareholders or other backers or interested persons…" There is evidence that Mr and Mrs McLennan own the company offices because that is referred to in the published accounts and, indeed, they receive rent from McLennan in respect of the company's use. The very fact that at least £20,000 is available (which I infer is not available as such from within the McLennan company) suggests that security is available.

20.
I therefore then turn to the amount of the security which should be ordered, it having been established to my satisfaction and within my discretion that this is an appropriate case for the ordering of security. The Defendants rely upon their Precedent H Costs budget dated 4 April 2014 in the sum of £316,541.15, of which some £87,000 had been incurred by then. Neither party's Costs budget has yet been approved by the court. I have not heard argument in any detail about the Defendants' Costs budget other than the assertion that it is disproportionate for a claim and counterclaim which totals between £500,000 and £550,000. I consider that there is something in the point but will not finally decide that issue in the context of costs management. I consider however that he would be fair to take as proportionate, on the limited information which I have, a sum of £250,000.

21.
From this, I need to strip out the costs which can be said to relate to the Counterclaim and the claims made therein which are separate from the defences to the Claim. But this is rather difficult to do because the President H form does not so differentiate. I can see that there would be elements of pleading, expert, witness statements, trial preparation and trial costs which would relate to the Counterclaim and, doing the best that I can, an amount of £100,000 reduction would be a fair allowance (with deductions of £15,000, £40,000, £10,000, £10,000 and £15,000 respectively for the specific elements respectively referred to in and a rounding figure of £10,000).

22.
That would leave a total of £150,000 as a reasonable proportionate estimate of the Defendants' costs of simply defending the Claim. In my judgement, an order for security in the sum of £80,000 would be fair and reasonable. To avoid any undue pressure on McLennan, this should be paid in four tranches of £20,000, with the first to be paid into court on 15 August 2014, and thereafter on 12 September, 10 October and 7 November 2014. The trial will have to go back partly because the best part of two or more months has been lost from the programme due to the efforts to mediate and also because at least the Claimant's claim will be stayed if and to the extent that it is unable to make the payments.

23.
An issue has arisen as to whether the proceedings should be stayed as a whole including the Counterclaim. On balance, I consider that only the Claim proceedings should be stayed and only stayed if and to the extent that there is non-compliance with the order; thus for example, if McLennan does not pay the second instalment on time the proceedings will be stayed. I do not consider that it is necessary to stay the proceedings overall in effect because I have stripped out of the amount of the security for costs ordered costs relating to the Counterclaim. Given that it is clear that McLennan will

in all probability be unable to pay the costs of the Counterclaim assuming that it is successful and that there is a net sum due to the Defendants, the Defendants go ahead on their Counterclaim knowing that there is an almost inevitable risk that they will not recover either the net sum or the costs of the Counterclaim.

24.
I will give permission to McLennan to apply to vary the amounts but on terms that any such application must be made promptly, that it is to be supported by appropriate evidence and that a proper explanation must be given as to why such information as to means could not practicably have been given before the hearing on or before July 2014. I must make it clear that this permission is not to apply to discharge this order but simply to vary the level and possibly the timings of the payments.

The IT Expert Application

25.
McLennan has instructed an IT expert, Mr Atkinson, to investigate whether or not any of the e-mails, said to have been forged or to be otherwise false, are genuine. Mr Atkinson is said to have found no evidence to suggest that the e-mails had been tampered with at McLennan's end, and this application was issued to secure access to the Defendants' electronic devices, and in particular the laptop or computer a device used by Mr Jones, albeit owned apparently by JJA. This was first mooted in correspondence in mid April 2014 at which stage the Defendants made it clear that what was being sought was much too wide and unnecessarily intrusive given that the device in question contained much information which had absolutely nothing to do with the dispute between the parties.

26.
What was sought by McLennan was for Mr Atkinson to have permission to inspect the relevant device but with the inspection being related to the following:

"a. Creating a forensic image of the hard drive of the Device;

b. Reviewing the e-mail client account settings relating to the e-mail address 'jj@jjteam.demon.co.uk';

c. Carrying out a keyword search in the following terms:

i. "dig in the archive",

ii. "comfort letter"

iii. "funds in from Muscat",

iv. "6k invoice",

v. "cash low from Oman",

vi. "long-standing R085K",

vii. "invoice 1313"

d. Review of the files on the Device containing the above keyword terms…"

27.
By the time of the adjourned hearing of this application and following a judicial hint at the first hearing, McLennan, sensibly through its Counsel, was prepared to reduce very substantially what was sought to an examination of the device by Mr Atkinson under supervision from or in company with an

IT consultant to be appointed by the Defendants, the examination being limited to the four e-mails in question and the related metadata and any copying thereof to involve each party having exactly the same copy and an undertaking of confidentiality to be provided to the Defendants and JJA as well as to the Court at by Mr Atkinson. This was sensible and proportionate and overcame the very real and proper objections.

28.
As was said by this Court in **M3 Property Ltd v Zedhomes Ltd** [2012] EWHC 780 (TCC):

“28. So far as the law is concerned, CPR Part 25.1 enables the Court to grant injunctions or orders "for the inspection of relevant property" or for the "preservation of relevant property". It is common ground that that the Court has the power to make the order sought but the order must be both necessary and proportionate. This was confirmed in the case of Patel v Unite [2012] EWHC 92 QB. This approach is consistent with the overriding objective.”

29.
It is primarily to the overriding objective to which one must look as to the basis on which to exercise the discretion to make this type of order. It may be helpful if I list (non-exhaustively) the factors which might properly legitimately be taken into account:

(a) The scope of the investigation must be proportionate.

(b) The scope of the investigation must be limited to what is reasonably necessary in the context of the case.

(c) Regard should be had to the likely contents (in general) of the device to be sought so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question.

(d) Regard should also be had to the human rights of people whose information is on the device and, in particular, where such information has nothing or little to do with the case in question.

(e) It would be a rare case in which it would be appropriate for there to be access allowed by way of taking a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates.

(f) Usually, if an application such as this is allowed, it will be desirable for the Court to require confidentiality undertakings from any expert or other person who is given access.

30.
The order as sought by McLennan was much too wide in any event and to a large extent offended against the factors which I have set out above, albeit that commonsense prevailed latterly.

Costs

31.
I have, orally, addressed the costs of the ITT Experts Application. The Defendants have succeeded in their Security for Costs application, albeit that they secured £80,000’s worth of security rather than the £200,000 which they sought. Because, however, the security application was fought root and branch and because significant security has been secured, I consider that it is right that McLennan should pay the Defendants’ costs, albeit that I will seek to strip out an element of the costs on summary assessment reflect the Defendants’ costs incurred in addressing the the higher amount.

32.
The total summary of the Defendants' summary costs bill is £12,907.50 plus VAT. That is challenged on a number of grounds. I reduce it to £12,000 to reflect additional work which I assess has been done to justify a figure of £200,000 to be claimed for security. It will further be reduced to reflect the lack of justification for the attendance at the hearing on top of a senior associate of another lawyer (£330). Mr Jones makes a fair point that the hourly rate for solicitors claimed by the Defendants at £290 per hour are very high for Grade B solicitors based in Milton Keynes (Civil Procedure Rules rates are £192 per hour); whilst I can see some justification for specialist construction lawyers' rates being somewhat higher than the standard rates, I would broadly accept a rate of about £220 per hour as reasonable. Counsel's fees at £7,500 are disproportionately high, albeit that the hearing fee of £1,500 is reasonable. The remainder was for advice. Whilst it was wholly reasonable to secure such advice, it is not reasonable for McLennan to have to pay more than £3,000 therefor and I would therefore allow £4,500 in total for such fees. That produces a net sum which I will round down to £7,900 to which VAT at 20% should be added producing a total of £9,480. This sum for costs should be paid within 14 days of today.

33.
Whilst I am aware that the Court Settlement Process has not proved successful, this case is crying out to be settled given the financial position of McLennan. I would very strongly urge the parties to think again and seek to resolve their differences amicably.