Case No: HT-13-390

Neutral Citation Number: [2014] EWHC 3546 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 29 October 2014

Before :

THE HONOURABLE MR. JUSTICE COULSON

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Between:

CIP Properties (AIPT) Limited **Cla**

- and -

Galliford Try Infrastructure Limited

- and -

Defe

EIC Limited

Third

- and -

Kone PLC **Fourth**

- and -

Fifth

DLG Architects LLP

Sixth

- and -

Damond Lock Grabowski & Partners (a firm)

- -

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Nicholas Baatz QC and Frances Pigott (instructed by **Squire Patton Boggs**) for the **Claimant**

Adam Constable QC and Richard Coplin

(instructed by **CMS Cameron McKenna**) for the **Defendant**

Joanna Smith QC and Michael Wheater (instructed by **Plexus Law**) for the **Third Party**

Kate Livesey (instructed by **Norton Rose Fulbright**) for the **Fourth Party**

Fiona Sinclair QC (instructed by **Mills and Reeve LLP**) for the **Fifth and Sixth Parties**

Hearing date: 3 October 2014

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Judgment

The Hon. Mr Justice Coulson:

1. Introduction

1.
During the course of the review CMC in this case, on 3 October 2014, two issues of principle arose. The first was concerned with the interaction between ADR and case management in the TCC. The second raised a potentially important issue in relation to the court's powers to order the filing and exchange of costs budgets in cases where the claim is worth in excess of £2 million (old regime) or £10 million (new regime). I dealt with the first point during the hearing, but said I would produce a written judgment setting out my views in more detail. I reserved the second point entirely, and was then provided with further written submissions which significantly widened the scope of the dispute about costs budgets. This short Judgment deals with both issues.

2.
By way of background, I should record that this is a claim by assignees in respect of alleged defects at a large development on the site of the former children's hospital in Ladywood, Birmingham. The claim for damages against the main contractors, Galliford Try, is based principally on the actual/estimated costs of remedial works. It is put in the region of £18 million. Galliford Try have issued third party proceedings against the architects and certain of their sub-contractors. The trial estimate is currently six weeks and I am told that it may take longer. Expert evidence in numerous disciplines will be required.

2. A 'Window' or Stay for ADR

3.
Often at a CMC, one or more of the parties will seek a stay of the proceedings whilst they endeavour to resolve their disputes by way of mediation or some other form of ADR. There can either be an application for an immediate stay, or for a stay further down the line, sometimes after disclosure or after the exchange of witness statements or expert's reports. As an alternative, the party making the application will not seek a formal stay of proceedings, but will instead ask the court to identify and fix a 'window' in the timetable, which can commonly be as long as three or four months, during which it is proposed that the parties can put the proceedings on hold and devote their attention to resolving the dispute by way of ADR.

4.
The judges in the TCC set great store by ADR. Disputes like this one are time-consuming and therefore expensive to fight out in the traditional way. Even if the court adopts all the various techniques for reducing the trial to a minimum (such as 'hot-tubbing' the experts and carefully timetabling the cross-examination), trials are often unwieldy and cost-inefficient. Expert's fees often account for a large proportion of the costs. A professional mediator, engaged at the right time in the process and in the right spirit of cooperation by the parties, will often be able to resolve the most intractable case and save everyone a good deal of money, time and effort. The TCC lists in London would be impossible to operate without the good work of mediators and others involved in the ADR process.

5.
In consequence, when setting directions for the trial of a large TCC case, such as this, the court will allow a reasonable period between each step in the process, so that the parties not only have sufficient time to take that step, but also have an opportunity to reflect and consider their positions before incurring the next tranche of costs. Commonly, the court will identify a period of two months or so between, say, disclosure and the exchange of witness statements, or between the exchange of witness statements and the production of the experts' joint statement (a document which, in the TCC,

usually comes before the reports themselves, in order to ensure that the reports simply focus on those matters on which the experts are not agreed). Such a period is usually long enough, in all but the most complex cases, to allow the parties to engage in ADR between those two steps, if they are agreed that this is a sensible course.

6.
In this way, the TCC endeavours to facilitate the ADR process at each stage of the litigation, whilst also keeping at the forefront of its consideration the requirement to put in place a cost-efficient and sensible timetable to lead up to a fixed trial date (on the assumption – which the court must make for these purposes – that there will be an effective trial). The fixing of the trial date, which often then dictates the timetable itself, is one of the critical elements of any CMC in the TCC. The trial date needs to be as soon as reasonably possible in order to ensure that costs do not get out of control, but not so soon that the parties have no time to reflect or even pause for breath in the preparation process.

7.
For these reasons, it is usually inappropriate for the court at a CMC to build in some sort of special 'window' of three or four months in order that the court proceedings can be put on hold whilst the parties engage in ADR. Such a course inevitably delays the trial date by the period of the 'window'. That delay will then inevitably increase the costs of the case. Thus, in my view, the fixing of any lengthy 'window', for purposes unconnected with the preparation for trial, is bad case management.

8.
Such a course is even less appropriate in circumstances, such as the present case, where there is a dispute about when the 'window' should be. Here the claimants vehemently oppose the fixing of the 'window' before disclosure, the course proposed by the other parties. The claimants say they need disclosure before they can engage in a meaningful mediation. As assignees, their position is readily understandable: they will not have seen, let alone have been party to, much of the contemporaneous documentation. Not only is it inappropriate for the court to decide a dispute as to precisely when the parties should mediate (it is a consensual process so that must always be a matter for the parties), but it is wrong in principle for the court to fix a 'window' for ADR at a time when at least one significant party – in this case the claimants – positively does not want it.

9.
Staying the whole proceedings to allow ADR or mediation to take place is an even worse option. It has all the disadvantages previously mentioned but, in addition, it can create uncertainties and the potential for tactical games-playing. The case of **Roundstone Nurseries Ltd v Stephenson Holdings Ltd**[2009] EWHC 1431 (TCC), where a stay for mediation did not lead to a settlement, and one party then sought to enter judgment against the other because of a mix-up about when the stay came to an end, is a good example of the sort of thing that can happen when proceedings are stayed and one party resorts to a purely tactical stance.

10.
A sensible timetable for trial that allows the parties to take part in ADR along the way is a sensible case management tool. A stay or a fixed 'window' is likely to lead to delay, extra cost and uncertainty, and should not ordinarily be ordered. The same applies, a fortiori, if the stay or the 'window' proposed is opposed by a significant party to the litigation. It has to be recognised that the requirements of ADR, on the one hand, and sensible case management to lead up to a prompt trail date, on the other, can sometimes be at odds: what is appropriate for one process may not be appropriate for the other.

At a CMC, I take the view that, to the extent that there is such a clash, sensible case management must come first.

11.
As I have already stressed, none of this is designed to undermine the importance of ADR, or the adverse costs consequences that may be visited on those parties who do not engage in that process (see for example **Halsey v Milton Keynes General NHS Trust**[2004] EWCA Civ. 576). It is simply to emphasise that parties must take all proper steps to settle the litigation whilst at the same time preparing the case for trial. It is not an either/or option.

12.
For all those reasons, as I told the parties at the hearing, I decline to order a 'window' of four months prior to disclosure in this case, a course of action and a time slot which the claimants oppose.

3. Costs Budgets: Introduction

13.
During the exchange of the helpful notes, prepared by counsel in advance of the review CMC on 3 October 2014, the defendant raised the possibility that, although the filing and exchanging of costs budgets pursuant to CPR 3.13 was not compulsory in this case (because, when the claim was started, the mandatory limit was £2 million, and even now that limit is only £10 million, whilst the claim is for £18 million), the court should exercise its discretion in favour of ordering such budgets to be provided. The various third parties supported the defendant in that application. The claimants opposed it. Mr Baatz QC reasonably pointed out that he could not deal with the detail of the application, because it had been raised so late. However he raised orally a point of principle which all parties asked me to decide, and his subsequent written note identified a second such issue. On the costs budget dispute, therefore, this Judgment is confined only to those two points of principle.

14.
At the time that these proceedings were commenced, the relevant provisions of the CPR were as follows:

(a)
CPR Part 3 Section II

"**3.12**

(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1 April 2013 except –

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Courts as the President of the Queen's Bench Division may direct,

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and the Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective."

(b)
Practice Direction 3E dealt with the detail of the format for costs budgets and the scope and extent of costs management orders.

(c)
The Statement of 18 February 2013

In exercise of their powers referred to in sub-paragraphs (b) and (c) of r3.12(1), on February 18 2013, the Chancellor of the High Court and the President of the Queen's Bench Division directed respectively that (a) in the Chancery Division and (b) in the in the Technology and Construction Courts, Section 2 and Practice Direction 3E should not apply to cases where at the date of the first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs "except where the court so orders". The Statement went on to say that "…it is envisaged that costs management orders would be made in all cases except where there is good reason not to do so". Even when the exceptions in the rule and the direction apply, the use of costs management should always be considered."

15.
By way of SI 2014/867, rule 3.12(1) and Practice Direction 3E were amended so as to read as follows:

"3.12

(1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except—

(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or

(b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or

(c) where the proceedings are the subject of fixed costs or scale costs or where the court otherwise orders.

(1A) This Section and Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders."

3E Practice Direction:

"A. Production of Costs Budgets

Part 7 multi-track claims with a value of less than £10 million

1. The Rules require the parties in Part 7 multi-track claims with a value of less than £10 million to file and exchange costs budgets: see rules 3.12 and 3.13.

Other cases

2. In any case where the parties are not required by rules 3.12 and 3.13 to file and exchange costs budgets, the court has a discretion to make an order requiring them to do so. That power may be exercised by the court on its own initiative or on the application of a party. Where costs budgets are filed and exchanged, the court will be in a position to consider making a costs management order: see

Section C below. In all cases the court will have regard to the need for litigation to be conducted justly and at proportionate cost in accordance with the overriding objective."

SI 2014/867 makes plain that these amendments do not affect proceedings (such as these) which were commenced before the SI came into effect on 22 April 2014.

4. Costs Budgets: Is There Any Discretion In This Case?

16.
At the hearing on 3 October 2014, it was my impression (and it was one shared by the other parties) that the claimants had conceded that the court had a discretion to order the production of cost budgets in this case, but argued that such a discretion was not open-ended. However, in the production of (unheralded) written submissions provided after the hearing, the claimants submitted that, on analysis, the court had no discretion at all in this case. For obvious reasons, I therefore deal with that point first.

17.
The claimant makes two inter-related submissions. First, they maintain that the words "or the court otherwise orders" in the original r3.12(1) (paragraph 14 above) operate only to allow the court to disapply costs management provisions from a multi-track case that would otherwise fall within CPR 3.12; they do not permit the court any discretion to order costs management in cases which are excepted from the rule by sub-paragraphs (a) to (c). In addition, they argue that the words "this Section and the Practice Direction 3E will apply to any other proceedings…where the court so orders", do not give the court the necessary discretion in this case because "other proceedings" can only be a reference to non-multi-track claims.

18.
The defendant (supported by the other parties, particularly EIC Limited) contends that both of these arguments are based on a strained construction of the words used. The defendant contended that the more natural meaning of the original CPR 3.12 is that the court has an overriding discretion to order the provision of costs budgets in all cases where, under the original regime, the claim was for over £2 million and indeed where, under the new regime, the claim is for over £10 million.

19.
I am in no doubt that the defendant and the other parties are correct in their submissions. Taking first the argument about the words "or the court orders otherwise", it seems to me clear that those words, which follow the exceptions at (a) to (c), give the court the discretion to disapply the application of the original CPR 3.12, and also the discretion to disapply those exemptions. That is the natural meaning of the words used. That is reinforced by the introductory word "unless": it introduces possible exceptions to the exceptions. Furthermore, given the repeated statement as to the purpose of costs management (see 3.12(2)), and the importance of these provisions in the context of the overriding objective, it is clear that a broad construction of the provision is appropriate. If it really was the intention to limit the application of these rules in the way now suggested by the claimants, that would have had to have been spelt out clearly and unambiguously. It is not because, in my view, the regime was not intended to limit the court's powers in the manner now suggested by the claimants.

20.
Further and in any event, I have set out at paragraph 14(c) above the provisions of the Statement of 18 February 2013. That includes the express advice from the President of the Queen's Bench Division that, even where the exceptions might apply, the use of costs management should always be

considered. If the claimants were right, that Statement would have no application or effect. That is another reason why I reject the claimants' construction of the words "or the court otherwise orders."

21.
In relation to the second point, the issue is whether "any other proceedings" means only non-multi-track proceedings, or whether the words mean what they appear to say, namely any other proceedings (of any type). Again, it seems to me plain that the wider construction must be right. That is the natural meaning of the words; 'any other proceedings' means just that: any proceedings, of any type, and therefore including multi-track proceedings. That is in accordance with the Statement of 18 February 2013. That is in accordance with the overriding objective and the stated purpose of costs management.

22.
Furthermore, if the claimants' construction was right, it would prevent discretionary costs management in a wide series of cases within the Rolls Building and could easily lead to the abuse of the process, whereby claimants who wanted to avoid the costs management regime could frame their claims for £1 more than £2 million (old regime) or £10 million (new regime). This would then avoid any consideration at all by the court of the proposed costs, no matter how disproportionate or inflated they were. That is not in accordance with the Jackson Report and these provisions of the CPR, which flow directly from that Report. It is wholly at odds with the Statement of 18 February 2013.

23.
I should emphasise that my analysis is based on the original wording of CPR 3.12(1) (paragraph 14 above), because that is the relevant rule for the purposes of these proceedings. I am not required to express a view about the new wording (paragraph 15 above) although I note that my construction of "any other proceedings", which words are also in the new r3.12(1A), would lead to exactly the same result under the new regime as I have identified under the old. But, although it is therefore immaterial, I should also note for completeness that the deletion of the word "unless" in the new r3.12(1)(c), and the incorporation of the words 'or the court otherwise orders' into a specific exception to the general rule in the revamped r3.12(1), may be an unfortunate piece of drafting which might lead (for what it is worth) to a different construction of those words in the new rule.

24.
However, for the reasons that I have given, I am in no doubt that the court has the necessary discretion to order the provision of costs budgets in this case. The next issue is whether that discretion is open-ended or is in some way fettered.

5. Costs Budgets: Is The Discretion Fettered?

25.
Mr Baatz QC argued at the hearing that, in consequence of these provisions, the court's discretion, pursuant to CPR 3.12(1), was not unfettered. He said it had to be exercised in the knowledge that the limit was originally £2 million and that the CPR Committee had increased the limit to £10 million but not beyond. In essence he said that, if the claim was for more than £2 million (old regime) or £10 million (new regime), the presumption must be that costs budgets were not to be ordered, and the burden fell on the parties who sought such budgets to demonstrate special circumstances in order to justify the exercise of discretion in their favour.

26.

In his written submissions in reply, Mr Constable QC argued that not only did the court have the necessary discretion, but that it was not in any way affected by the existence of the mandatory limits. He accepted that, as the party making the application, he had the burden of proof in the ordinary way, but he said that the exercise of that discretion was otherwise unfettered and that there was no negative presumption or additional burden on him merely because the claim was for more than £2 million or £10 million.

27.
I take the view that the exercise of the court's discretion under CPR 3.12(1) is unfettered. There is nothing in the CPR to suggest otherwise. The discretion extends to all cases where the claim is for more than £2 million (old regime) or £10 million (new regime). In such a case, if there is an application for the filing and exchanging of costs budgets, the court has to weigh up all the particular circumstances of the case, in order to decide whether, in the exercise of its discretion, such budgets should be provided. There is no presumption against ordering costs budgets in claims over £2 million or £10 million, and no additional burden of proof on the party seeking the order.

28.
Costs budgets are generally regarded as a good idea and a useful case management tool. The pilot schemes (including the one here in the TCC) have worked well. They are not automatically required in cases worth over £2 million or £10 million, principally because the higher the value of the claim, the less likely it is that issues of proportionality will be important or even relevant. A claimant's budget costs of £5 million might well be disproportionate to a claim valued at £9 million, but such a level of costs is probably not disproportionate to a claim worth £50 million. Thus, whilst the fact that the claim is worth over £2 million or £10 million means that the court has to exercise its discretion in favour of the application before the filing and exchange of costs budgets are ordered, it seems to me that such an exercise of discretion should take into account all of the relevant material, without prejudging or making any specific assumptions one way or the other. [1]

29.
Finally, a point arose in the written submissions on behalf of Kone to the effect that the defendant should be obliged to provide a number of different costs budgets, dealing with its defence of the claims from the claimant, and then separately with its claims over against the other parties, including Kone. The defendant resists that, arguing that the issues between Kone and the defendant overlap with issues between the claimant and the defendant. They also say there are overlaps between these issues and those against DLG, so that to order a separate budget for the third party claim against Kone would require the defendant to allocate costs common to three separate cases and with overlapping issues to particular actions. They maintain that it would be unworkable, impractical and expensive to require them to undertake such a task.

30.
In my view the defendant is right in its submissions on this point. In a case like this, where a defendant is seeking to pass on the claims made against it as a main contractor to the specialist sub-contractors involved in particular aspects of the work, it is always difficult for the defendant to identify what costs might be spent on defending the claim and what costs might be spent passing it on. In addition, I am acutely aware that the preparation of costs budgets can, of itself, be an expensive task. That is one of the complaints regularly made about these new provisions. It would be unfair, and not in accordance with the overriding objective, to require the defendant to incur significant cost in providing such a breakdown within its costs budgets.

31.
I am reassured that this is the right approach in multi-party litigation, or a series of cases with common parties, by reference to the judgment of Master Kaye QC in **Lotus Cars Ltd v Mechanica Solutions Inc**[2014] EWHC 76 (QB). There, he refused to order a series of separate costs budgets. At paragraph 18, the Master said that "in the case of large group actions where the management of cases is to be treated as common and is dealt with accordingly, there is no sensible reason why the costs budgeting should always be considered separately and some good reasons why it should not." In my view, the same is true of multi-party litigation were there are a number of third parties. The defendant will be able to provide some information as to the specific costs to be incurred against third parties but there will be common costs which cannot be allocated and which they should not be required to allocate at this stage.

6. Costs Budgets: Conclusions

32.
Accordingly I decide the points of principle against the claimants, and rule that the court in this case has a complete discretion to decide whether costs budgets should be filed and exchanged. If the claimants continue to oppose the provision of such budgets, this CMC will need to be re-fixed for a date, possibly in November, for the matter to be argued out on the detail. As noted above, I make no comment at this stage on the facts, although I do observe that, in view of the likely involvement of many experts, whose fees can often be the single largest items of cost in any bill, the provision of costs budgets and the possibility of subsequent costs management orders comprise at least one way of keeping such fees under some control.

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[1] Contrary to the defendant's suggestion, I do not consider that the Statement of 18 February 2013 creates a presumption in favour of making an order. In my view, the exercise of the court's discretion should be unfettered in either direction.