Neutral Citation Number: [2016] EWHC 3082 (TCC)

Case No. HT-20015-000381

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY & CONSTRUCTION COURT

Rolls Building

London, EC4A 1NL

Date: Thursday, 13 th October 2016

Before:

MRS. JUSTICE JEFFORD

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B E T W E E N :

	IMPERIAL CHEMICAL INDUSTRIES LTD	Claimant
	- and –	
	MERIT MERRELL TECHNOLOGY LTD	Defendant

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MS. J. STEPHENS (instructed by Clyde & Co.) appeared on behalf of the Claimant.

MR. J. MORT QC (instructed by Mills & Co.) appeared on behalf of the Defendant.

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J U D G M E N T (As approved by the Judge)

MRS. JUSTICE JEFFORD:

1
The first matter that I have to deal with this afternoon, and I have already indicated my view on this, is whether or not there should be an adjournment of the “liability” trial that has been listed in this court for 21st November.

2
I have already indicated that it is clear to me that that adjournment should happen, and that the liability hearing in this matter will take place in April of next year on the date that was previously fixed for the so-called quantum hearing. I will come back later to the question of fixing of a date for that further hearing.

3
This matter has a slightly convoluted and benighted history. It was last before the court on Wednesday, 5th October. That was listed as the hearing of certain applications made by Imperial Chemical Industries Ltd (“ICI”) for declarations that related to Adjudication No.4 which had taken place between ICI and Merit Merrell Technology Ltd (“MMT”).

4
It had already been anticipated that there would be insufficient time for that and other procedural matters to be heard, so time was allowed today. The day following that hearing, MMT made an offer to ICI’s solicitors. That offer related to an application that MMT had made to adjourn the trial on 30th September. As I have said, it should be adjourned.

5
MMT’s offer was, in terms, that they proposed that the parties agreed to vacate the hearing presently listed to commence on 21st November, each party bearing its own costs of, and arising out of, the adjournment, and each party bearing its own costs of, and arising out of, the application to adjourn. The parties should then endeavour to agree an order for further directions.

6
There was by that time also an application by ICI for further time to serve and file witness statements. MMT similarly proposed that they would accede to that application, and that any costs of, and arising out of, that application would be costs in the case.

7
They made it clear that that offer was available for acceptance until 2p.m. on Tuesday 11th October.

8
On Tuesday 11th October ICI first wrote by email to MMT, this correspondence obviously being via their solicitors, Clyde & Co., at 1.30p.m., i.e. half an hour before the offer expired, indicating that they were taking instructions. At some time shortly after that, MMT made it clear that the offer was not open for acceptance after 2p.m. At 2.30p.m. Clyde & Co. emailed again to say that they were likely to agree to the adjournment on the terms set out in MMT’s offer, apparently ignoring the fact that it was not open for acceptance after 2p.m. At 3.45p.m. ICI then purported to accept the offer that MMT had made, but they did so in these terms:

“We confirm that our client agrees to adjourn the proceedings on the terms of your letter on 6th October. We trust you will inform the court that a hearing on directions will no longer be necessary. If you are still intending to seek recovery of costs from our client, which will be robustly defended, we

should inform the court that the parties have reached agreement on the directions save for costs, and that a short hearing will be necessary."

9
MMT's solicitors, Mills & Co., responded to that by email, stating that the parties would need to attend before the court in order to persuade the judge to vacate the hearing; that there was still the issue of relief from sanctions for ICI's failing to serve its witness statements, but that they had asked for an extension; that the court would be asked to make directions; and, so far as costs were concerned, Mills & Co. made it clear that MMT would be seeking its costs of the application to adjourn.

10
I refer to all of that as background to submissions made to me this afternoon and in part because, on the face of her skeleton argument, Ms. Stephens sought to argue that ICI had accepted MMT's offer, and that therefore it was not open to MMT to ask this afternoon for its costs of the application to adjourn.

11
That clearly seems not to be right because the offer was not open for acceptance. To the extent that ICI's letter was therefore a counter offer, it seems to me that it is clear that it was not accepted by MMT; indeed, it was not anticipated as being necessarily accepted on terms that costs would be borne by each party, precisely because, as Mr. Mort, QC drew to my attention, the email from Clyde & Co. at 3.45p.m. indicated that the court should be told that the hearing would no longer be necessary, save for the matter of dealing with costs.

12
Therefore, I find myself in the position of having to deal with this application for costs by reference to how this matter has come to be adjourned, although, as I will say in a moment, in doing so I can, and should, have regard to any offers that have been made.

13
I said at the outset this case has a somewhat benighted history. It does. This litigation arises out of a project concerned with the construction of a paint processing plant. MMT carried out works for ICI but their contract was terminated in February 2015.

14
There have been, so far, four adjudications arising out of this project. Matters have come before the court in relation to those adjudications at least twice. There are now proceedings pending before this court, which is these proceedings, which are concerned with the propriety of the termination by ICI, in February 2015, of MMT's contract.

15
Directions were given by Mr. Justice Coulson in February 2016. They created the split of the liability and quantum trial. In relation to the liability trial they led to a hearing on 21st November this year, including disclosure in March 2016 and witness statements to be served by 17th June 2016, although that date was slightly extended by agreement between the parties.

16
The matter then came back before the court in July of this year before Mr. Justice Edwards-Stuart on applications by both parties in respect of disclosure. I do not propose to deal in any detail with that

application, suffice to say that it resulted in orders being made that both ICI and MMT should, to some extent, revisit their disclosure.

17
That application was heard on 15th July of this year. It was not until 16th September that ICI served on MMT further disclosure. I am told that that disclosure took the number of documents disclosed from 4,000-5,000 documents to over 30,000 documents. It is not in issue that those documents included items that had previously been claimed to be privileged, and technical reports which went directly to issues raised on the pleadings as to the extent of defects in the welding carried out by MMT as part of this project and which, as I understand it, lie at the heart of ICI's case that it was entitled to terminate MMT's contract.

18
Given that those matters are inevitably going to be important matters for expert evidence, and that the hearing on liability was listed for 21st November of this year, that to my mind put MMT in an impossible position in terms of preparing for trial. There was, and remains, no explanation as to why those documents had not been previously disclosed to MMT.

19
MMT had already indicated in correspondence that there might be a need for an adjournment and out of an abundance of caution, Mr. Mort QC told me, they made an application for an adjournment on 30th September. I say "out of an abundance of caution" because by that time ICI had already made its own application to extend time for service of witness statements.

20
Ms. Stephens urges upon me that that need for further time to prepare the witness statements arose out of MMT's failures in respect of disclosure. MMT, it appears, had served a very substantial number of documents, many of which appeared to be irrelevant. There is clearly a dispute as to why that was. Mr. Mort contends that that was because of the breadth of search terms that had been provided by ICI to MMT.

21
On 15th July Mr. Justice Edwards-Stuart made orders that required MMT to review its disclosure with a view to reducing down by relevance the number of documents to be disclosed, but recognising in what he said that that might be something of a crude exercise. In essence, it was important it was done quickly and that the product of that exercise should be delivered to ICI on a rolling basis which was what was done during the course of August.

22
Despite that, back in July, and throughout the course of August and into September, ICI did not make any application for further time for its witness statements, nor did it indicate that it thought that it would be necessary to adjourn this trial. Instead, an application was made for more time to serve statements on 19th September with the proposed date being 3rd October. I note that that was itself only six or seven weeks before the date then fixed for trial.

23
It seems to me that at that point it ought to have been self-evident to ICI that this trial could not practically go ahead in November. When the very sensible offer was made by MMT on Thursday of last week to have an agreed adjournment with the costs of the adjournment and the application being borne by both parties, it was an offer that ought sensibly to have been accepted.

24
I am told that there were difficulties brought about by ICI's internal workings in obtaining instructions to accept that offer. That may be and I may have taken a different view if that had been communicated to MMT in a reasonable manner. In fact, what happened was that half an hour before the offer expired Clyde & Co. wrote to MMT via email as if they had only just taken instructions, or were just taking, instructions, from their clients. After they had clearly been told the offer was expiring at 2p.m., they wrote again in the course of the afternoon as if they could simply extend the time for accepting the offer as they felt like it.

25
That was not an appropriate way to proceed. Whilst I accept, as Ms. Stephens says, that this can have had very little impact in fact on the costs incurred, it is something that I take account of in the mix, so to speak, as to the parties' approach to this matter of the adjournment.

26
If the offer had not been on the table, I would have made an order that Mr. Mort was to have his costs of and occasioned by this application and the adjournment. For the reasons I have given, it seems to me ICI have put MMT in an impossible position. Whilst there may have been fault on MMT's part as well, that was not something that ICI took a sensible approach to. Given the offer that was made as well, and the failure to accept it within time, that seems to me to be inevitably the outcome of this application in relation to costs.

27
Therefore, in relation to the application for the adjournment I order that ICI is to pay MMT's costs of and arising from the adjournment and of this application.

28
I do, however, take a rather different view in relation to the matter of the witness statements, simply because that was something that became a catalyst for the making of the application. It then became part and parcel of the application. It seems to me in doing fairness between the parties that the simplest approach would be to say that the costs relating to that application should then be costs in the case. That is the outcome.