



LEGAL BRIEFING

Brookfield Construction (UK) Ltd (formerly Multiplex Constructions (UK) Ltd) v Mott MacDonald Ltd [2010] EWHC 659 (TCC), Mr Justice Coulson

These proceedings arose from the delayed Wembley Stadium development. MPX was claiming in excess of £200m from Mott under various heads of claim in respect of engineering consultancy services provided in connection with the project.

The issues here arose following two Case Management Conferences (“CMCs”). Mr Justice Coulson wanted to set down a marker for the future conduct of the proceedings. In particular the Judge made it clear that he is trying to ensure that the dispute did not go the same way as the *Cleveland Bridge (UK) Ltd* litigation, “notorious for the vast costs incurred”, and for there to be a sensible cost/benefit ratio for both parties.

The Facts

MPX and Mott engaged in the TCC pre-action protocol process between 2005 and 2007 at significant cost to the parties with apparently “little real value to either side”. MPX had spent £8.48m during the pre-action process, which included £5m in relation to experts’ fees, and then changed solicitors in September 2007.

The first CMC was held on 30 July 2009 and focussed on the deficiencies in MPX’s pleaded case and the best way to try the claim, which included a proposal for a sub-trial of issues arising during the project up until 2 August 2004. The Judge emphasised that if the Court ordered a lengthy sub-trial in early 2011, the Court would, save in exceptional circumstances, expect the parties to settle their differences thereafter, as it was not a proportionate use of the Court’s resources to envisage a further lengthy trial.

A further CMC was held in December 2009, at which it became apparent that MPX had not addressed the question of the proposed issues to be tried in the sub-trial in a coherent way and Mott complained about the high level of MPX’s costs. This caused the Judge to convene two further review CMCs to address the costs issue and the scope of the sub-trial.

The Issues

- (i) What issues would be included in the scope of the proposed sub-trial in 2011?
- (ii) What were Mr Justice Coulson’s views on the costs that MPX had incurred?
- (iii) Whether the Court should make any orders by reference to the amount of the parties’ estimated costs?

The Decision

At the CMC in relation to the sub-trial, the Judge expressed reservations about (1) whether any meaningful decisions as to critical delay could be made at a sub-trial which had a cut-off date part-way through the project, and (2) whether a decision on a small percentage of the claims by value (~20%) would lead to a settlement of the whole case. Nevertheless, following assurances by the parties that all relevant breaches had occurred by 2 August 2004 and that it would be possible to address issues of criticality, the Judge finalised a list of issues to be decided at the sub-trial.

At the costs related CMC, Mott made eight complaints about the level of MPX's costs. The Judge agreed to give an indication as to what might be regarded as reasonable and proportionate costs, as this may assist the parties in the prospect of settlement or ADR.

Up until 11 December 2009, MPX had incurred costs of £28.675m and MPX estimated that it would spend a further £17m for the sub-trial, i.e. an overall estimate of £45.695m up to mid 2011. By comparison Mott's overall estimate of its costs up to the end of the sub-trial was £27.5m. The Judge commented that in assessing reasonableness and proportionality, the sum of the costs incurred had to be considered against the product of that expenditure. The Judge expressed on-going concern about the clarity of MPX's pleadings and concluded that the overall costs incurred by MPX were potentially disproportionate and unreasonable.

On a related point, Mr Justice Coulson noted in round figures that £12m of the £28.5m incurred by MPX related to experts and described the £5m spent during the pre-action process as "astonishingly high". The Judge considered the £12m expenditure to be prima facie unreasonable and disproportionate because the existing pleadings did not clearly demonstrate the use of an expert analysis of important events and causes of critical delay.

Mr Justice Coulson was also concerned about the level of future costs. Perhaps the most significant outcome of the CMC in relation to costs was the Judge's direction, and the parties' agreement to a commensurate order, that costs would only be recoverable for the sub-trial beyond the December 2009 estimate if the party in question was able to demonstrate an unforeseen increase which, in all the circumstances, the Judge concluded was reasonable. In this way the Court had achieved a form of costs control which was reasonable, proportionate and in accordance with the overriding objective. The Judge also made further remarks encouraging the parties to resolve their differences in a sensible and cost effective manner.

Comment

This Judgment is a helpful reminder to litigants and practitioners that although the Court is available as a forum for objectively determining disputes, in any litigation, but especially large complex cases, co-operation to properly refine key issues prior to trial and making reasonable attempts to resolve differences by ADR are vital steps in order to avoid incurring excessive costs.

Mr Justice Coulson is justly determined to avoid the Court's resources being called upon to make a final decision on all of the issues in this dispute beyond the sub-trial. The Judge's timely comments on costs considerations and ADR may well bring the parties closer to achieving a similar result before the sub-trial begins.

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