

**TRANSCRIPT OF PROCEEDINGS**

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**NCN: [2019] EWHC 3337 (TCC)**

Ref. HT-2018-000263

**IN THE TECHNOLOGY AND CONSTRUCTION COURT  
AT THE HIGH COURT OF JUSTICE**

7 Rolls Buildings  
Fetter Lane

**Before THE HONOURABLE MR JUSTICE FRASER**

**IN THE MATTER OF**

**MIDAL CABLES LTD (Claimant)**

**-v-**

**AMEC FOSTER WHEELER GROUP LTD (Defendant)**

**MR T OWEN appeared on behalf of the Claimant**

**MR L WYGAS appeared on behalf of the Defendant**

**WHOLE HEARING**

**22<sup>nd</sup> NOVEMBER 2019, 09.45-09.53**

**(AS APPROVED)**

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MR JUSTICE FRASER:

1. This is an application which has been issued earlier this week in this case. The whole proceedings are a claim by a company called Midal Cables against the defendant whom I will call AMEC, who counterclaim. The application has been issued by AMEC, which undoubtedly on its face seeks to vacate a trial which is due to take place in March 2020. In fact, that means that the trial will be commencing just slightly longer than four months from today.

2. I am going, briefly, to identify the history of this action. AMEC have in the past, I am afraid, been subject to some criticism from the court in respect of the way in which this action has been progressed to date. In my judgment, AMEC have tried on previous occasions certainly to hinder the timely progress of having a resolution of the substantive disputes on both the claim and counterclaim. It might be thought unduly cynical of the court to have come to this conclusion, but this application is a further example of that. I think it is notable that the application itself plainly seeks to vacate the trial date. The trial dates in the TCC are set a long way in advance and they are only vacated in exceptional circumstances.

3. I should say for completeness that, having ordered this application to be listed at short notice into the 9.30am Friday listing, which in this court is currently held for urgent applications, the situation has changed. Regular practitioners in this court know that the 9.30am listing is usually used for cases, and applications, that are not entirely conventional and/or which are troublesome. Mr Wygas for AMEC has, very sensibly, somewhat glided away from this being an application purely to vacate the trial, using disclosure difficulties as an explanation, and now presents a more attractive picture. He has rather skilfully presented the application as what is effectively a choice for the court, which is keep the trial but allow AMEC not to comply with existing court orders in respect of disclosure, or, if AMEC are to be expected to comply with existing orders, which have not been appealed by either side, then his submission is that the trial date cannot possibly be kept.

4. That is, really, presenting a very unattractive picture when the gloss is stripped away. Mr Wygas frankly explains that, so far as vacating the trial is concerned, the only exceptional circumstance which is relied on by AMEC is the volume of disclosure. He points out that this has led to far greater a number of documents being produced than were expected.

5. However, he has to overcome a substantial difficulty in the following respect. Firstly, the disclosure guidance hearing was over two months ago, and he says that that is relatively late in the day, but I do not accept that. I take into account that the original order for directions, which was fairly lengthy and substantive, was sealed on the 13<sup>th</sup> of May 2019. That is over six months ago.

6. Secondly, although in his skeleton argument he does make some criticisms of the claimants for effectively not engaging, is the politest way putting it, about narrowing down search terms, this rather glosses over that the search terms were originally agreed by the parties. Therefore there is no possible basis, in my judgment, for such criticism of the claimants.

7. Taking account of the witness statement supporting this application, it seems to me that disclosure obligations can and should be complied with based on the existing orders. It is simply a question of the resources that AMEC are prepared to devote to this task. It is a task which has been known about, in principle if not in detail, since at least May, if not far

earlier than that. It is a fairly routine and ordinary task and the category of documents which is said to be the most difficult or time consuming one, is the category that deals with AMEC's counterclaim.

8. Now, in my judgment, it is somewhat illustrative at this point to look at the way the counterclaim is pleaded. In the defence and counterclaim, which was settled by counsel and served in January 2019, the summary of the sums of the counterclaim, which appears in paragraph 73.28, is losses said to be suffered by AMEC as a result of Midal's breaches. These losses were identified with very considerable particularity in terms of figures. Examples are "discovery of the defective conductor and awaiting delivery" in the sum of £428,686. That has been particularised down to the smallest amount of £6.00.

9. The same point applies to almost every single item in the counterclaim. These are not rounded or approximate figures. For example, "standby labour plant and equipment" is £411,983. "Additional costs of delays between the 26<sup>th</sup> of May and the 8<sup>th</sup> July 2016" are £416,005. Another one is "loss of production and delays due to winter working conditions" which is £4,148,882.

10. That means that the grand total of the particularised counterclaim is a total of £7,509,385. That is a very precise sum. A great number of these documents must have been available in order for that figure properly to be pleaded in that way. There are only two heads of the counterclaim which do not have any figures against them. One is taking delivery and redistributing a replacement conductor, which is the fourth item in the table, page HB2983 of the bundle, and the other is the ante-penultimate entry in the table on the next page of the pleading, which is inflation costs of staff, labour, plant and materials. Those are the only two un-particularised items. The vast majority are pleaded as I have explained, down to very small and precise exact figures. That can only have been done by reference to relevant documentation.

11. I also consider it relevant that that pleading is supported by a statement of truth by Miss McCourt, solicitor for AMEC, and she is the same person who has served the accompany witness statement supporting this application. She has identified in that witness statement what she says are really considerable difficulties in the scope of AMEC complying with disclosure. I simply do not accept that in a case like this, the scope of disclosure, even taking account of the figures for the number of documents that Miss McCourt explains, is in any way remarkable or unusual at all. It seems to me to be a description of the type and number of documents that are entirely to be expected.

12. I am prepared to consider some changes to the dates for some of the steps that have to be taken between now and the trial. I am not prepared to entertain, on the material currently before the court, moving the trial date at all. I am also not prepared to entertain, on the face of the material before the court currently, removing the requirement for compliance of existing court orders on the part of AMEC. AMEC may not wish to comply with them, and/or may not want to expend the necessary sums to comply with them. That is entirely different in nature to AMEC not being able to comply with them, which I find that they can readily do. That is my judgment on the application simply on the material included in the application. When one puts that together with the approach of AMEC to this litigation, and the type of criticism which has been levelled at AMEC to date by at least three different judges of the TCC, then it can be seen that this application is simply part of a pattern of behaviour which is not to be encouraged.

13. I do not accept that disclosure cannot fully be given until the end of January. It simply seems to be a question of the number of paralegals AMEC is prepared to have devoted to this task. AMEC is going to have to resource this case properly and devote whichever number is required to achieve a realistic timetable so that this trial can take place sensibly in March 2020, as already ordered in the directions.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

This transcript has been approved by the Judge