Neutral Citation Number: [2025] EWHC 285 (TCC)

Case No: HT-2023-000202

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY & CONSTRUCTION COURT

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 17 January 2025

Before:

MR JUSTICE CONSTABLE

- -

Between:

(1) GS WOODLAND COURT GP 1 LIMITED
(2) GS WOODLAND COURT GP 2 LIMITED
(ACTING AS GENERAL PARTNERS ON BEHALF OF GS WOODLAND COURT LIMITED PARTNERSHIP)

Claimants

- and –
(1) RGCM LIMITED
(2) HADFIELD CAWKWELL DAVIDSON LIMITED
(3) MET-CLAD CONTRACTS LIMITED
(4) UNITE MODULAR SOLUTIONS LIMITED
(5) UNITE INTEGRATED SOLUTIONS PLC
(6) EUROLEC SERVICES LIMITED
(7) QUADRO SERVICES LIMITED

Defendants

- -

MS PACKMAN KC (instructed by Jones Day) appeared for the **Claimants**
MS STEPHENS KC (instructed by Reynolds Porter Chamberlain LLP) appeared for the **First Defendant**
MR FOWLER (instructed by Keoghs LLP) appeared for the **Second Defendant**
MR COULSON (instructed by Eversheds Sutherland (International) LLP) appeared for the **Third Defendant**
MS WILLIAMS (instructed by Walker Morris LLP) appeared for the **Fourth & Fifth Defendants**
MS KEATING (instructed by Howes Percival LLP) appeared for the **Sixth Defendant**

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JUDGMENT

MR JUSTICE CONSTABLE :

Introduction

1. These proceedings are, by the Order of the Court, subject to Costs Management. A half day Costs Management hearing took place, at the end of which there was an application by a number of Defendants for their costs of the Costs Management hearing. Such applications are not routine. Given the potential significance of the point to practitioners, it seemed appropriate to hand down a perfected version of the short *ex tempore* judgment granting the application. This is that judgment. I have included my *ex tempore* decision on the general points advanced by the parties, but I have excluded the nuts and bolts of the phase-by-phase assessment of costs. I have added a summary of the outcome that formed part of my decision-making during the course of the hearing so as to make sense of the application for costs.

General Points

2. This is a claim relating to numerous alleged defects at a block of student accommodation. That accommodation is being built in a modular-unit fashion. The Claimants contend that a very large number of defects in relation to the fire-safety attenuation ought, it is said, to have been put in place but has not been put in place properly.

3. The contract was let on a construction-management basis. There are, on paper at least, seven defendants. The fourth and fifth are taken together and the seventh is insolvent. The first (D1) is the construction manager. It is relevant that 100 per cent of the claim is being passed on to the construction manager. There are then a number of other parties who face some or a number of the allegations, not necessarily all of them. The Second Defendant (D2) is the architect. The third (D3) is responsible for the cladding on the external walls. The fourth (D4) supplied the modular units. The fifth (D5) was the developer. They (D4 and D5) are being represented jointly. Sixth (D6) was responsible for fire-stopping works. The seventh was the installer.

4. In terms of overview points, Ms Packman, on behalf of the Claimants, made the fair point at the outset that this is, as far as the Claimants are concerned, potentially more complex than a case against a single D&B defendant. Of course, all of the same issues would be aired in the context of a D&B-type litigation, but the onus on the Claimants to focus on which particular issues should be made against which particular Defendants is more acute in litigation of this kind.

5. That said, Ms Stephens is also right in her observation that there is nothing particularly novel in relation to this case. It is an expert-driven defect case and it is not the sort of case that needs to be over-lawyered, either in terms of rates reflecting overly complex litigation of this type, or, indeed, the number of hours that lawyers need to put in in order to support the investigations and, in due course, presentation of the case.

6. In terms of headline points to make at this stage, in relation to incurred costs, I am not in a position today to form a view on the material I have, or any time available, as to whether or not the incurred costs are excessive. That does not preclude an argument on detailed assessment that they are excessive, but I am certainly not in a position to make a finding at this stage that they are.

7. What I can do, on any view, however, is take the incurred costs well into account when I am considering the overall costs that would be expended in relation to any particular phase. There is particular force in the point that Ms Stephens makes that the Claimants' experts should, before such a claim as this is launched, be well advanced in their investigations and their views. Of course there will be engagement with the Defendants' experts, but one would hope that will be a narrowing of views, particularly in circumstances where it is unlikely that experts, in line with their duties to the Court, will adopt the general 'non-admission' approach which has been taken within the pleadings.

8. In terms of proportionality, it is not helpful in an over generalised way to take broad comparisons with other cases between the amount at stake and the overall costs incurred and estimated by ratio. One of course steps back and looks at the number -- the overall total here, some now £11 million being claimed against a potential remediation cost of £30 million -- but making comparisons to other cases can be unhelpful. A £100 million case may turn on a point of contractual interpretation. The fact that £100 million is in dispute has little to do with the amount that it would be reasonable and proportionate to spend on a contractual-interpretation dispute. Similarly, you could have a low-value claim that is a 'death-by-a-thousand-cuts' type of case where costs may end up being 'disproportionate' if only the amount claimed, and not the complexity, is considered.

9. On any view, however, one headline point can be made by reference to a comparison between the Claimants' costs with those of the Defendants, either individually and in the aggregate. Ms Packman is of course right that one has to exercise caution when making any comparisons in cases where there will be a burden on the Claimants to prove each of the allegations against each of the Defendants, and at least some of the Defendants are only facing a small number or a number of those claims.

10. That said, in my experience in a case such as this, whilst the Claimants' costs will likely exceed the highest of the Defendants', it is unlikely that they will be significantly higher than the highest of the costs of the Defendants; and certainly not approaching

the aggregate of all of the Defendants' costs taken together. Each of the Defendants have to, for example, instruct their own experts, go through their own disclosure exercises, and there will some be necessary duplication, if it can be put that way, of costs between each Defendant facing the same allegations. That is not so for the Claimants, who will have a single team and will therefore have a more efficient mode of working.

11. Standing back, the costs of £11 million or so (and £12 million as it was before concession this morning), against the aggregate of around £12 million to £13 million of all of the Defendants is a preliminary indicator that the costs claimed by the Claimants may potentially be disproportionate and/or unreasonable.

12. In terms of rates, it is not for me to provide any particular rates that ought to be substituted for those claimed. However, the rates claimed are significantly in excess of the guideline rates. The claimed rates by Jones Day for the Claimants: Grade A, £1,089 each, compares with Band 1 London of £566; Grade B, £450 against £385; Grade C, £421 and £446 against £299; and trainee paralegal, £248 against £205. I do think a case of this nature justifies London Band 1, but I am reminded of the clear words of Lord Justice Males in Samsung Electronics Co Ltd & Ors v LG Display Co Ltd & Anor (Costs) [2022] EWCA Civ 466, where he recognises that, when it has been determined that Band 1 is appropriate, that in itself recognises that the litigation is substantial and complex, and it qualifies as very heavy commercial work.

13. In that case, as this, the Claimants have not attempted to justify their solicitors' charging rates substantially in excess of the guideline rates. The only justification that Ms Packman advances for the rates claimed is that the other Defendants have claimed in excess of the guideline rates. But that is no justification. If the Claimants wanted to take a point about the Defendants' rates they could have done so; instead they have agreed them. That does not mean that I am bound to take the same view in relation to the Claimants' claimed rates. I do not take that view.

14. The rates are excessive and, in due course, whilst of course I am not going to say anything specific in terms of what the rates should be or the precise calculation, I will take account of a relatively sizeable downward adjustment in each of the phases where there are heavy time costs to reflect the excessive rates. An overview of the extent of that contribution to the overall claim has been provided by Ms Stephens. If one substitutes the guideline rates for those that are claimed, it takes about £1.4 million off the overall budget.

15. In terms of hours, it seems to me that is the point at which we should stop overall comments and turn to the case on a phase-by-phase basis.

(Proceedings continue)

16. My spreadsheet tells me, subject to correction and checking, that that makes a total estimated costs of £4,212,126 and total of incurred and estimated costs of £7,374,370, which I will say for completeness, in a case such as this, seems to me to be a reasonable and proportionate sum in view of the complexity of the matter and the amount in dispute. This compares to a sum of £8,743,141 claimed as of this morning, and which was amended downwards by around £1m at the commencement of Ms Packman's

submissions. This was due, in large part, to a recognition that Reply witness statements and expert reports, for which there is no Order, should not have been part of the budget.

(Proceedings continue)

The Application for Costs

17. There is an application before me advanced by Mr Fowler for the Second Defendant seeking its costs, and, in the alternative, seeking that the Claimants do not recover their costs of preparation and attendance today. No other costs in relation to the budgeting process leading up to the costs of today are being sought. That submission and application is being supported by D3, and D4 and D5, who have each put in Summary Schedules of Costs. D6 and D1 are in the position that they have not submitted their own costs schedules, and are not in a position to, and do not, make an application for their own costs. They do, however, support the submission that the Claimants should not recover their costs.

18. The traditional view has been that costs generally in relation to costs management are in the case. That, as Ms Packman rightly says, is the appropriate starting point. There have been two recent authorities demonstrating a trend, at least before Master Thornett, that the Court should take a more proactive view in considering the approach of parties in their cost management and the extent to which the way in which they have approached the matter has led to a hearing, or has increased the likelihood of a hearing, which causes the parties to incur costs and, of course, uses judicial resources.

19. The first of those two cases is Nicholas Worcester v Dr Philip Hopley [2024] EWHC 2181 (KB). That was a medical negligence case. It was a case in which there was a specific hearing to deal with cost management, as is regularly the case in the King's Bench division. The latter part of the judgment deals with the discussion of the parties' submissions.

20. For my purposes, in the context of the application before me, it is sensible to make reference to paragraphs 19 and 20 and 30 of that judgment in particular:

> "*19. In short, a party that resolutely proceeds to a separately listed costs management hearing with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties' engaged without any potential consequence in costs.*
>
> *20. Neither do I agree that if there is to be an order other than "in the case", the starting point is that a party that secures approval of a sum at least something in excess of that offered by an opponent thereby establishes "success" and so should avoid an adverse costs order against them. Not least because success could equally be defined as that of the opposing party in securing substantial reductions. Hence, as I am satisfied, why it is appropriate for the court to take a more rounded and general view of the process that took place.*

> ...
>
> *30. The overall impression and conclusion I reached was that the Claimant's Precedent H was unreasonable and unrealistic in terms of proportionality. It led to a polarised approach between the parties on budgeting that had prevented settlement and so necessitated a separate hearing proceeding that either might have been vacated or, even if not, should have followed a more conventional process of modest arithmetical adjustment and modification, rather than fundamental deconstruction of the Claimant's proposals and as led to sizeable reductions.*"

21. Master Thornett took the same approach in Jenkins v Thurrock Council [2024] EWHC 2248. I fully endorse the approach taken by the Master. It is plainly appropriate that a party that resolutely proceeds to a separately listed cost-management hearing with an overly ambitious budget should not readily assume that it will avoid any potential consequence in costs.

22. I also agree that, in considering whether a party has 'succeeded', it is not determinative that the sum allowed exceeds the amount they have been offered. Equally, the mere fact of a reduction, as a matter of course, will not itself mean 'success' for the opposing party. The word 'resolutely' is important, because the reasonableness of the sums offered is also obviously a factor in judging the conduct of the party whose costs are being scrutinised. There will be a range within which, in the round, and even where there is a separate costs management specific hearing, the appropriate starting point of costs in case remains the appropriate order, if the conduct of both parties is within the range of reasonableness. The Court has to step back and look at the numbers involved and use its judgment to determine whether this case is a case that is on the wrong side of the line, and where one party cannot demonstrate appropriate conduct in approaching the cost-management process. Have the parties had a realistic view as to what is reasonable and proportionate and likely to be recovered?

23. There are a number of features of this case that suggest that the Claimants' position is clearly on the wrong side of the line.

24. In headline terms, the Claimants were seeking -- at least before the reductions that were made this morning -- £8.74 million. Against that, the highest offer they received -- from D4 and D5 - was £3.539 million. The other offers ranged between £2.7 million and £3.4 million. In fact, the sum recovered was £4.212 million. It is readily obvious from the scale of the reduction that the Claimants' Precedent H was unrealistic both in terms of reasonableness and proportionality. It is not necessary to ascribe the word "success" or "loss" to that, but if it were, the Claimants 'lost' the hearing.

25. In addition, I had to make a number of remarks on a phase-specific basis in relation to the hours, which at one point I remarked as "implausible". In relation to rates, on the basis of the Court of Appeal authority to which I have made reference, that there would (given the absence of meaningful justification) be a significant reduction from the rates which were claimed. It was pretty obvious, what this Court's approach would have been to the rates claimed.

26. In the circumstances of this case, therefore, I conclude that the application for costs is well founded. There is no particular reason in this case why that costs order should not

be the ordinary costs order that is made when a party has 'lost': the losing party is deprived of its costs and has to pay the other parties' costs to the extent claimed and assessed as reasonable.

27. So, D2, D3, and D4 and D5 will recover their reasonable costs of today from the Claimants limited to the costs of attendance of counsel and one solicitor at the hearing today and that the Claimants shall bear their own costs of the costs management hearing in any event. D1 and D6 do not get their costs but they will not be responsible for any part of the Claimants' costs.

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