JUDGMENT : MR JUSTICE JACKSON: TCC. 12th March 2007

1. This judgment is in six parts, namely Part 1 – Introduction; Part 2 – The Facts; Part 3 – CB's Application for Costs; Part 4 – The Legal Principles; Part 5 – Decision on Application for Costs; Part 6 – Payment on Account.

Part 1: Introduction

2. This is an application for costs following this court's judgment in the second round of the litigation between Multiplex Constructions (UK) Limited ("Multiplex") and Cleveland Bridge UK Limited ("CB"). That judgment is ***Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited (No. 2)*** [2007] EWHC 145 (TCC). CB's parent company, Cleveland Bridge Dorman Long Engineering Limited, is second defendant in the litigation but has taken no part in the current round.

3. The present application for costs has been fought with the same degree of vigour and enthusiasm as all other issues in the litigation between these two parties. As before, counsel for Multiplex are Roger Stewart QC and Paul Buckingham; counsel for CB are Adrian Williamson QC and Lucy Garrett. I am grateful to all counsel for their assistance.

4. In this judgment I shall use the same abbreviations as in the two previous judgments.

5. After these brief introductory remarks I must now turn to the facts.

Part 2: The Facts

6. On 2nd August 2004 CB ceased work as Multiplex's steelwork sub-contractor. It is common ground that on that date one or other party repudiated the sub-contract. Multiplex and CB each allege that the other repudiated the sub-contract. Both Multiplex and CB claim damages for repudiation.

7. Multiplex's claim for damages for repudiation was originally quantified in the sum of £3,114,905.00. See paragraph 77 of Multiplex's amended consolidated particulars of claim.

8. On 6th December 2005 Multiplex, by its solicitors' letter of that date, made an open offer of settlement. Multiplex offered to accept £5,999,999.00 in full and final settlement of all Multiplex's claims for damages for breach of contract, including the claim for repudiation. That offer was not accepted by CB.

9. On 18th April 2006 Multiplex made a Part 36 offer to CB. I do not know the terms or substance of that offer, save that it did not relate to Multiplex's claims for damages for breach of contract. CB did not accept the Part 36 offer.

10. The litigation duly proceeded. The first ten preliminary issues were the subject of a trial in April and May 2006. Preliminary issue 8 posed the question of which party was in repudiatory breach. In a judgment dated 5th June 2006 I held that CB was the party in repudiatory breach. CB's application for permission to appeal against that decision is still under consideration by the Court of Appeal and that application has not yet been determined.

11. In August 2006, following its success on preliminary issues 1 to 10, Multiplex served amended Scott Schedules, claiming vastly increased damages for repudiation. In schedules 4B and 4D Multiplex claimed a total of £16,271,434.00 in respect of the design and fabrication of temporary work undertaken by Hollandia. Approximately £15 million is attributable to temporary works for the roof.

12. CB challenged the legal basis of Scott Schedules 4B and 4D. CB maintained that under the supplemental agreement it had no continuing responsibility for the design or fabrication of temporary works for the roof. On 20th October 2006 CB applied for and obtained an order that this question should be resolved as a further preliminary issue, namely issue 11.

13. On 13th November 2006 Multiplex made a second Part 36 offer to CB. Again, I do not know the terms or substance of that offer, save that it did not relate to Multiplex's claims for damages for breach of contract. CB did not accept the second Part 36 offer.

14. The trial of preliminary issue 11 was held in January 2007. Issue 11, like the previous preliminary issues, was hard fought. Multiplex called two witnesses, CB called three witnesses. All witnesses were rigorously cross-examined. The outcome of preliminary issue 11 was a clear victory for CB. (See the judgment of this court dated 31st January 2007.)

15. On the day that judgment was given I dealt with Multiplex's application for permission to appeal. By consent CB's application for costs was stood over to be dealt with at a later date.

Part 3: CB's Application for Costs

16. CB applies for an order that Multiplex do pay (a) CB's costs of responding to schedules 4B and 4D and (b) CB's costs of and occasioned by preliminary issue 11, to be assessed on the standard basis. CB estimates that the total amount of those costs is £426,095.00. CB seeks a payment on account of that costs liability in the sum of £275,000.00.

17. Multiplex's position is that no costs order should be made in respect of preliminary issue 11, since one open offer and two Part 36 offers have been made. Multiplex points out that it cannot be known until the end of the litigation whether or not Multiplex will do better than the offers which it has made. Accordingly, says Multiplex, a proper order is that costs should be reserved. Furthermore, Multiplex contends, for a number of other reasons, that no payment on account of costs should be ordered.

18. CB's application for costs was adjourned to allow consideration of the issues, on the basis that it would be re-fixed at a time convenient to leading counsel. The only time convenient to leading counsel was, as it turned out, 5 p.m. on Wednesday 7th March. After two hours of detailed submissions and citation of authority, I declined to give judgment at 7 p.m. that evening. Owing to TCC commitments out of London for the following two days, I said that I would give judgment on the next occasion that I am sitting in the London TCC, namely today.

19. I shall first set out the legal principles, then give my decision on the application for costs, and finally consider the question of payment on account.

Part 4: The Legal Principles

20. CPR r 44.3 provides:

> *"(2) If the court decides to make an order about costs:*
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order…*
>
> *(4) In deciding what order (if any) to make about the costs, the court must have regard to all the circumstances including:*
> *(a) the conduct of all the parties;*
> *(b) whether a party has succeeded on part of he case even if he has not been wholly successful; and*
> *(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)…*
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> *(6) The orders which the court may make under this rule include an order that a party must pay:*
> *(a) a proportion of another party's costs;*
> *(b) a statement amount in respect of another party's costs;*
> *(c) costs from or until a certain date only;*
> *(d) costs incurred before proceedings have begun;*
> *(e) costs relating to particular steps taken in proceedings;*
> *(f) costs relating only to a distinct part of the proceedings…*
>
> *(7) Where the court would otherwise consider making an order under paragraph 6(f), it must instead, if practicable, make an order under paragraph 6(a) or (c)".*

21. In ***AEI Rediffusion Music Limited v Phonographic Performance Limited*** [1999] 1 WLR 1507 at 1522 to 1523 Lord Woolf MR made the following comments on Part 44 of the CPR, which was then about to come into force:

> *"I draw attention to the new rules because while they make clear that the general rule remains that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which result in the court making different orders as to costs. From 26th April 1999 the 'follow the event principle' will still play a significant role, but it will be a starting point from which the court can readily depart. This is also the position prior to the new rules coming into force. The most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so".*

22. It follows from the foregoing that in many cases where one party wins on a preliminary issue, that party may obtain relief in respect of costs even if unsuccessful in the litigation as a whole. Nevertheless, the circumstances of each particular case must be considered.

23. In ***David de Jongh Weill v Mean Fiddler Holdings Limited*** [2003] EWCA Civ 1058 Lightman J. said this at paragraph 33:

> *"33. The fact that only nominal damages are awarded after a single trial of the issues of liability and damages in the circumstances of a particular case may constitute grounds for refusing the claimant his costs or his full costs, of the issue of liability. There is much to be said for the view that the incidence of costs should be the same whether or not for case management reasons there has been an order for a split trial, whether or not the order for a split trial was made on the initiative of the claimant or the defendant. If this is so, in the case where there is a split trial and it is left uncertain until conclusion of the trial on quantum whether the claimant will be recover more than nominal damages, it may be proper for the trial judge to defer making any order for the costs of the trial of the issue of liability until the final outcome of the action is known. This may be the case whenever the judge considers that there is a real possibility that the outcome of the assessment of damages may affect the merits of the parties' entitlement to the costs of the issue of liability. If the judge forms the view that it does, he must consider carefully whether justice to the defendant requires him to postpone any decision on costs until the final outcome of the action is known. I do not think that the judge's decision in the exercise of his discretion to follow this course in this case and postpone the decision on costs can or should be disturbed".*
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> Tuckey LJ and Ward LJ both agreed with that judgment.

24. Let me now turn to cases where there has been a payment into court or a Part 36 offer. In ***HSS Hire Services Group plc v BMB Builders Merchants Limited*** [2005] EWCA Civ 626; [2005] 1 WLR 3158, the claimant succeeded

at a trial on liability, but quantum was reserved for later determination. The judge was told that there had been a payment into court, but not the amount. The judge ordered the defendant to pay the claimant's costs of the trial on liability. The Court of Appeal reversed that decision. Waller LJ, with whom Mance LJ and Sir William Aldous agreed, said this:

> *"28. In defending the judge's approach and in answer to the question as to what apart from paying into court the defendants could do to protect themselves against an order for costs on the liability issue, Mr. Dunning robustly argued, it was open to them to concede liability, and if they chose not to do so then liability for costs followed if they lost the issue. If that approach is right it seems to discourage the arguing of preliminary points.*
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> *29. The contrary approach is that parties should be encouraged to make Part 36 payments in and/or offers; they should also be encouraged to try preliminary points if that could lead to the saving of costs overall. If payments in are to be totally ignored at the conclusion of the trial of a preliminary issue, that will discourage a find for the trial of the same, and may even discourage Part 36 offers where preliminary issues have been ordered. The proper approach at the conclusion of a trial of a preliminary issue where there has been a Part 36 payment in or a Part 36 offer, should therefore normally be to adjourn the question of costs pending the resolution of all the issues including damages, at which stage the quantum of the Part 36 offer can be revealed and the discretion in relation to the parties exercise be in the knowledge of it…*
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> *35. In my view r 36.19 does not allow for the disclosure of the amount of a payment in. On its language it allows simply the disclosure of the fact that there has been one or the fact that there has not. The consequences of that being the correct interpretation of r 36.19 seem to me to be as follows. If the court is told that there has been no payment in, then the court is free to exercise its discretion to award costs in relation to the preliminary issue and there is no difficulty with r 44.3(4) (c). If however it is told that there has been a payment in, then, in any but perhaps the most exceptional case, I find it very difficult to think that there could be circumstances where if the issue of damages remains to be decided, the judge can do otherwise than to reserve the question of costs until after the determination of that issue".*

25. In ***Intense Investment Limited v Development Ventures Limited*** [2006] EWHC 1628 (TCC) the claimant, which had won most of the preliminary issues, applied for an order for costs. Judge Peter Coulson QC reviewed the authorities mentioned above and he decided on the facts of that case that it was not appropriate to make an immediate order for costs in favour of the claimant. Instead he reserved the costs to a later stage of the litigation.

26. I deduce from the authorities which have been cited that, following the trial of a preliminary issue, the court may make an order for costs in favour of the party that has won that issue. Before doing so, however, the claimant must consider all the circumstances of the case. If the judge is told that the unsuccessful party on that issue has made a payment into court, or a Part 36 offer, the normal order should be to reserve costs. Nevertheless, in an exceptional case, despite such a payment in or offer, the judge may still make an immediate order for costs if the circumstances warrant such a course.

27. With the benefit of this review of authority I must now address CB's application for costs.

Part 5: Decision on Application for Costs

28. The first matter to note is that Multiplex's claim for damages in respect of the roof temporary works is a new claim, which Multiplex introduced by amendment in August 2006. This claim was set out in Scott Schedules 4B and 4D. There was no legal basis for this claim unless Multiplex succeeded on what became preliminary issue 11.

29. For sensible case management reasons preliminary issue 11 was identified by counsel and made the subject of a separate trial. The separation of issue 11 from issues 1 to 10 is a consequence of the stage at which Scott Schedules 4B and 4D were served. CB succeeded at trial on preliminary issue 11. Subject to any appeal, the consequence is that Multiplex's claim in respect of roof temporary works falls away. The vast majority of the items in schedules 4B and 4D can play no part in the assessment of damages for repudiation.

30. Against that background it seems to me that CB is entitled to an order for costs in respect of schedule 4B, schedule 4D and preliminary issue 11. These are discreet matters. The costs are readily identifiable. Multiplex has caused CB to incur these costs by advancing a new claim for which there was no contractual basis. I quite accept that Multiplex has not acted improperly in pursuing its claim for roof temporary works. This is simply a matter in which costs should follow the event, as happened in respect of preliminary issues 1 to 10.

31. Let me now consider the effect of Multiplex's various offers. The first relevant offer is that dated 6th December 2005. This offer was not made pursuant to CPR Part 36. Nevertheless, it should still be taken into account. (See r 44.3(4)(c)).

32. Mr. Roger Stewart on behalf of Multiplex points out that at the end of the day Multiplex may recover £6 million as damages for breach of contract. In that event, Multiplex will do better than its offer and obtain the various benefits which flow from a well judged claimant's offer. Furthermore, says Mr. Stewart, it will then become apparent that CB ought to have accepted the 6th December offer. If that offer had been accepted (as it should have been), then Scott Schedules 4B and 4D would never have been served and preliminary issue 11 would never have come to trial.

33. I am not persuaded by these arguments. On Mr. Stewart's future scenario Multiplex will recover £6 million damages for breach of contract assessed by reference to matters other than the roof temporary works. Multiplex may well obtain the various benefits which flow from a claimant doing a better than its offer. Nevertheless, even

in that scenario Multiplex will still have to pay CB's costs of issue 11 and the associated pleadings. The fact will still remain that Multiplex had introduced a new dimension to the litigation, namely the claim for roof temporary works, that Multiplex was unsuccessful in respect of that claim, and that the new claim generated substantial and unnecessary costs.

34. Let me now turn to the two Part 36 offers. Neither of these offers related to Multiplex's claim for damages for breach of contract. I accept that preliminary issue 11 has some effect on valuation issues. Nevertheless, it is clear from all the circumstances of this case that, whatever may turn out to be the terms of the two Part 36 offers, it could never become appropriate to depart from the order indicated above in respect of preliminary issue 11 and Scott Schedules 4B and 4D.

35. I have carefully considered the Court of Appeal's decision in ***Jackson v Ministry of Defence*** [2006] EWCA Civ 46, upon which Mr. Stewart relies. That decision turns upon its own facts. I can readily see how the Court of Appeal in that case came to uphold the judge's award to the claimant of 75% of his costs. That decision does not, however, affect the proper costs order to be made in the present case.

36. Let me now draw the threads together. For the reasons set out above I conclude that, despite Multiplex's various offers, this is an exceptional case in which it is appropriate to make an immediate order for costs in respect of preliminary issue 11.

37. Let me now turn to the amount of CB's costs. Some costs have been wasted as a result of CB's inadequate disclosure and late disclosure. An adjustment falls to be made on this account. It is also the case that some parts of Scott Schedules 4B and 4D will survive, namely those items relating to the bowl and the PPT.

38. I have also considered counsel's submissions in respect of Mr. Rogan's evidence. In my view it is not appropriate to make any reduction in costs because certain parts of Mr. Rogan's evidence were not accepted.

39. Having considered all the circumstances of this case, the history of proceedings in respect of issue 11, the course of the trial and counsel's submissions, I conclude that the right order is that Multiplex should pay 85% of:
(a) CB's costs of responding to Scott schedules 4B and 4D; and
(b) CB's costs of and occasioned by preliminary issue 11.

40. I make no separate order for costs in favour of the second defendant, which played no perceptible part in the trial of preliminary issue 11.

Part 6: Payment on Account

41. The correct approach to an application for a payment on account of costs was set out by Jacob J in ***Mars UK Limited v Teknowledge Limited*** [1999] 2 Costs Law Reports 44. The relevant passage reads as follows:

> *"I now turn to the second issue, whether or not there should an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum that the likely full amount.*
>
> *This is likely to have practical advantages in another way. The motive for trying to prolong a detailed assessment, namely putting off the evil day when payment has to be made, will be considerably reduced when he who has to pay can only put off the evil day in respect of a considerably reduced sum. Moreover the whole point of the detailed assessment as a commercial matter may become less important with the result that there will be less detailed assessments than there used to be of taxations of costs. Thus I start from the proposition that there should be an interim payment in general. However, the court has a discretion. In exercising that discretion the court must take into account all the circumstances of the particular case. One of those is that the defendant may wish to appeal. Another is dealing with the case in a way which is proportionate to the financial position of each party, one of the matters which one must consider in allowing the overriding objective of enabling the court to deal with the cases justly. The overriding objective applies as much to the exercise of the costs discretion as to any other discretion given under the Rules. This is a case, for example, where there is a wealthy successful party and a financially weak unsuccessful party. That is one thing that should be taken into account. Other things that might be taken into account are the likelihood of an appeal or possibly successful appeal. For example, there may be a case in which a claimant is financially weak. Even if it succeeds there might be an appeal by the defendant and the claimant needs the money to respond to the appeal. That would be a particularly good reason for ordering a payment on account".*

42. In deciding whether to exercise my discretion in favour of ordering a payment on account I bear in mind the following four matters:

(1) Multiplex has applied to the Court of Appeal for permission to appeal in respect of issue 11, having unsuccessfully applied for such permission at first instance.

(2) CB's accounts show that CB is in a weak financial position and dependent on the support of its ultimate parent company.

(3) CB has incurred substantial costs in dealing with preliminary issue 11 and Scott schedules 4B and 4D. CB is entitled to reimbursement of 85% of those costs, but the precise assessment of that entitlement will take some time.

(4) In relation to preliminary issues 1 to 10 (when the boot was on the other foot) CB was ordered to pay £700,000.00 on account of Multiplex's costs.

43. Mr. Stewart urges upon me that Multiplex will recover substantial further costs in respect of preliminary issues 1 to 10. He submits that, despite the costs order which he fears I might make on issue 11, nevertheless, there will in the end be a balance of costs payable to Multiplex.

44. I am not persuaded by this argument. It is not clear to me what the overall costs position will be at the end of the day. The one matter which is clear at the moment is that CB has an immediate entitlement to the costs identified in Part 5 above.

45. Having considered all the circumstances of this case, with the benefit of counsel's submissions, I am quite satisfied that it is proper to order a payment on account. The risk of CB's insolvency, upon which Mr. Stewart places emphasis, should not deflect the court from making such an order.

46. I come finally to the question of amount. Mr. Stewart has advanced a battery of arguments in relation to the amount of CB's bill of costs. The one question of principle which arises concerns the effect of the conditional fee agreement which CB had entered into with its solicitors. CB's solicitors have not yet disclosed the information referred to in paragraph 14.9 of the practice direction supplementing CPR Part 44. In those circumstances, it would not be appropriate to include in the payment on account the uplift for rates applied by CB's solicitors in consequence of the conditional fee agreement.

47. I will not extend this judgment with an item by item analysis of CB's bill of costs. I can see that there is scope for substantial debate about CB's total claimed figure of £426,095.00. Furthermore, CB is only entitled to 85% of its costs.

48. Doing the best I can on the present material I am satisfied that CB will recover more than £150,000.00 on the detailed assessment. I shall make an order that Multiplex do pay £150,000.00 on account of costs to CB within 14 days from today. I request that counsel do draw up the precise form of this court's order in relation to the costs.

49. Finally, I should mention that both leading counsel have asked me to consider the question of appeal in relation to this costs order, and I have duly done so. In my judgment, neither of the threshold tests for permission to appeal set out in CPR r 52.3(6) is satisfied. Accordingly, permission to appeal is refused.

MR ROGER STEWART QC and MR PAUL BUCKINGHAM (instructed by Messrs. Clifford Chance) appeared on behalf of the Claimant

MR ADRIAN WILLIAMSON QC and MS LUCY GARRETT (instructed by Reid Minty LLP) appeared on behalf of the Defendants