Multiplex Construction Ltd v Cleveland Bridge Ltd [2008] Adj.L.R. 02/06

CA on appeal from TCC (Mr Justice Jackson) before May LJ; Smith DBE LJ. 6th February 2008

Lord Justice May:

1. There are before the court, in formal terms, two matters. They arise from a judgment of Jackson J in the Technology and Construction Court of 31 January 2007, [2007] EWHC 145 (TCC), when he decided issue 11 in a complicated series of disputes between Multiplex Construction UK Limited as appellant and Cleveland Bridge UK Limited and its parent company as respondents. This is all about Wembley Stadium, and the facts and matters appear in Jackson J's judgment, in previous judgments of this court and in this court's judgment determining the issue 11 appeal from Jackson J, which was handed down on 21 December 2007 under the number [2007] EWCA Civ 1371.

2. There is also technically before the court another appeal against Jackson J's costs decision in issue 11. He gave his costs decision on 12 March 2007 and, unless I have got it wrong, that appeal is before the court under number 2007/0697. Jackson J's costs decision was made (somewhat perhaps against his inclination) when Multiplex were in the process of appealing against the decision that underlay it and in circumstances where Jackson J's decision, standing as it then did, was very largely in favour of Cleveland Bridge. The order as to costs that Jackson J made on 12 March 2007 was that Multiplex should pay 85% of Cleveland Bridge's costs of, and occasioned by, a) the responses to schedule 4(B) and 4(D); and b) preliminary issue 11, such costs to be assessed on a standard basis if not agreed; and that Multiplex should pay Cleveland Bridge £150,000 on account of those costs by a time on 26 March 2007. The £150,000 was, so I understand, duly paid.

3. In the result that this court, by its judgments of 21 December 2007, allowed Multiplex's appeal in part, the parties have, for practical purposes, compromised the costs appeal, which is 2007/0697. They have compromised it subject to one point of contention as to interest. The agreement otherwise is that Jackson J's order, in the two respects which I have indicated, should be set aside, and that in their place should be an order that the costs below -- that is to say, the costs of issue 11 before Jackson J -- should be reserved to Jackson J; that the interim payment on account of costs of £150,000 should be returned to Multiplex, and that there should be no order for the costs of that costs appeal. The one remaining issue is whether Cleveland Bridge should pay Multiplex interest on the interim payment of costs -- that is to say, interest on the £150,000 between whatever date in March 2007 it was paid and whatever date (by virtue of this agreed order) it should be repaid.

4. The interesting debate that we have had this morning concerns not what the rate should be nor what period it should be paid, but whether interest should be paid at all in circumstances where Mr Stewart accepts that the answer to the question -- wherein lies the power of the court to make an interest order in these circumstances -- is not absolutely clear. He has, however, referred us to a number of provisions of the Civil Procedure Rules and suggests that the power to award interest is, for practical purposes, explicit; or if it is not, it is readily to be inferred. I should say that I would personally find it surprising if the court did not have power to award interest in a commercial situation such as this, where a relatively large sum of money has changed hands pursuant to an order of the court and where, in effect, the court is ordering it to be repaid. I say "in effect" because the parties have, in fact, agreed that it should be repaid, but, as I indicated, it would be my view certainly that if the parties had not so agreed, the court would unquestionably have ordered it to be repaid in circumstances where the substance of the costs order below was going to be set aside.

5. So where are the provisions of the rules that are relevant to this? First of all, the Appeal Court's powers in rule 52.10 include, firstly, that the Appeal Court has all the powers of a lower court and, secondly, that the Appeal Court has power to make orders for the payment of interest. It seems to me that, if it were necessary to do so, the very fact that the Appeal Court has power to make orders for the payment of interest -- which is 52.10(2)(d) -- would be sufficient to give the court that power. As importantly, perhaps more importantly, we go to the provisions relating to the court's powers at first instance -- the Appeal Court having all the powers of the first instance court. We find in rule 54.36 that the orders which the court may make under this rule include an order that a party must pay -- sub-sub(g) -- interest on costs from and until a certain date, including a date before judgment; and in sub-rule 8, where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed. Mr Stewart correctly points out that the Civil Procedure Rules and practice generally has moved in favour of the court ordering interim payments towards costs to be assessed at a later date. He submits, with some force, that if the court did not have power in the circumstances which arise in this case to order interest to be paid, that might be detrimental in certain circumstances to a party's willingness to ask for, or agree to, an order in those terms.

6. Mr Stewart also refers to rule 25.8. This concerns not a payment or interim payment of costs, but an interim payment towards damages or other payments to be made; and we find at sub-rule (5), where a defendant has made an interim payment and the amount of the payment is more than his total liability under the final judgment or order, the court may award him interest on the overpaid amount from the date when he made the interim payment. Mr Stewart suggests that that implicitly empowers the court to do essentially the same with an interim payment of costs. Mr Williamson submits that the explicit power, in that respect, might suggest that the power did not exist in the court where it was not explicitly set out for a payment on account of costs.

7. I am quite clear that the court does have power, in the circumstances of this case, to make an order for interest. I am inclined to say that that power explicitly resides either in rule 52.10(2)(d) or in the first instance court's power in rule 44.3(6)(g), read in the context of rule 44.3(8). If that were not regarded as absolutely explicit, it seems to

me that it necessarily follows, by implication, that the court does have the power which is relied upon by Multiplex in this case. Accordingly, in my judgment, Cleveland Bridge should pay interest on the repaid amount of £150,000 at base rate plus 1% from the date on which it was paid, some date in March 2007, until the date when it is repaid. The version of the parties' agreement I have does not stipulate when it should be repaid, but no doubt we can determine that in a moment.

8. That, then, is the first question that is before the court this morning. The second question is the costs of the preliminary issue 11 appeal. Mr Williamson points out, helpfully explaining to us that it is not profitable for this court to go into the detail, that schedule 4(B) and 4(D) before Jackson J are the schedules in which the details of the claims to which points of principle on the appeal relate. There were two issues upon this appeal. The first issue was, in shorthand, the fabrication issue, otherwise referred to as the Toblerone issue; and upon that issue Multiplex were unsuccessful, Cleveland Bridge were successful. The second issue goes under the telegram shorthand of the design issue, and Mr Williamson tells us that the fabrication issue -- the Toblerone issue -- went to the 4(B) claim, amounting to some £11 million, and that the design issue went to the schedule 4(D) claim, which was in total in the order of £5 million, which went down to £2 million as a result of Jackson J's decision, and which has now gone back to £5 million as a result of the decision of this court.

9. Mr Williamson's position, in its extreme version, is that Cleveland Bridge have been more successful than Multiplex in this court on this appeal because, in the result, they retained their position on a substantially greater sum of money than Multiplex succeeded on theirs. He suggests the possibility at least that Cleveland Bridge should get an order of costs in their favour as a result of this court's decision. Mr Stewart for Multiplex, on the other hand, says that in substance Multiplex are the successful party, and that you only have to look at the movement in their favour, away from Jackson J's order to the order resulting from this court's decision to see that that is so. And, he submits, that although Multiplex did lose on the Toblerone issue, the time occupied by the Toblerone issue was really quite small in comparison with the time occupied by the design issue. He points to a reference to economical submissions in my judgment, to the length of his own skeleton on the Toblerone issue, and to the comparatively short length of Mr Williamson's skeleton on that subject. Mr Williamson for his part submits that these issues were at least of equal importance in this court, and that he had to come to court prepared to deal with the Toblerone issue. It was a matter for Mr Stewart if he chose to be economical on the subject.

10. In my judgment, viewed as a whole, Multiplex were the successful party in this court. It may well be true, and it is certainly a matter to be taken into account, that the monetary consequence of the decision of this court is that which Mr Williamson describes; but in my view the contest in this court, certainly in the time occupied in the hearing and in the court's own consideration of this case, was very much more concerned with the design issue than with the fabrication issue. It is certainly true, as Mr Stewart submits, that Multiplex were the successful party in the sense that they improved significantly, perhaps substantially, on the position that they were in under Jackson J's judgment. It is always a matter of impression when one comes to percentages, but in my judgment Multiplex -- in that respect being the successful party -- should be entitled to an order for costs in their favour, taking account of Mr Williamson's point and the degree of success that Cleveland Bridge also had. In my judgment, the appropriate percentage of costs to be awarded to Multiplex for this appeal is 50%. I would so order.

Lady justice Smith DBE:

11. I agree.

Order: Appeal allowed

Mr R Stewart QC and Mr P Buckingham (instructed by Messrs Clifford Chance LLP) appeared on behalf of the Appellant.
Mr A Williamson QC (instructed by Messrs Reid Minty LLP) appeared on behalf of the Respondent.