

JUDGMENT : MR JUSTICE JACKSON: TCC. 19th March 2008

1. This judgment is in five parts, namely, part 1, introduction; part 2, schedule 4C as presently constituted; part 3, the application to amend; part 4, decision; part 5, conclusion.

PART 1. INTRODUCTION

2. This is an application to amend pleadings. The application is made at trial during a period of adjournment between the end of closing speeches and the commencement of evidence. The matter has been very ably argued by junior counsel on both sides.
3. The background to this long-running litigation has been set out in many judgments of this court and the Court of Appeal. See in particular *Multiplex v Cleveland Bridge* [2006] EWHC 1341 (TCC), *Multiplex v Cleveland Bridge* [2007] EWHC 145 (TCC), *Multiplex v Cleveland Bridge* [2007] EWCA Civ 443 and *Multiplex v Cleveland Bridge* [2007] EWCA Civ 1372.
4. I shall use the same abbreviations in this judgment as in previous judgments.
5. The general principles upon which the court should deal with amendment applications under the Civil Procedure Rules were stated as follows by Peter Gibson LJ in *Cobbold v Greenwich LBC* (transcript 9th August 1999): *"The overriding objective is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon, provided that any prejudice to the other party caused by the amendment can be compensated for in costs and the public interest in the administration of justice is not significantly harmed."*
6. When an application to amend is made during trial these principles must be applied with particular care. On the one hand, the court does its best to ensure that the real issues between the parties are articulated and adjudicated upon however late those issues emerge. It is no part of the court's function to punish litigants for mistakes made by their lawyers. On the other hand, the court must protect all parties at trial from suffering undue prejudice by reason of late amendments.
7. In the present case the parties, having fought out no less than 11 preliminary issues, are now engaged upon the final trial of their litigation. The evidence is extensive and the issues are protean. The trial bundle, which is growing daily, now stands at about 425 ring files. The parties have entered into a time-sharing agreement, which will enable this trial, including closing speeches, to be concluded by the end of May. The fact that both parties are operating under strict time limits is a factor which the court must take into account when exercising its discretion in respect of applications to amend.
8. On Tuesday 11th March, which was Day 2 of the opening speeches, Multiplex served a document outlining the amendments which they wished to make. The draft amended pleadings setting out the precise amendments sought were served on Friday 14th March. The application for permission to amend was listed for hearing yesterday, namely, Tuesday 18th March.
9. Certain parts of the application were dealt with by agreement. Furthermore, after hearing brief argument yesterday morning I permitted Multiplex to make amendments to schedule 2 of the Scott Schedule which substantially increase Multiplex's claim in respect of valuation issues. I took the view that these amendments, although late, were clearly explained in Multiplex's expert evidence (served one month before trial) and that Cleveland Bridge would be able to deal with those amendments despite the other demands upon their time.
10. After schedule 2 had been dealt with yesterday morning, attention then focused upon schedule 4C of the Scott Schedule. Most of the amendments which Multiplex seek to make to that schedule are strongly contested.
11. In order to deal with these issues I must first say something about schedule 4C in its unamended form.

PART 2. SCHEDULE 4C AS PRESENTLY CONSTITUTED

12. Schedule 4C is entitled *"Damages arising out of CBUK's failure to complete the permanent works design and drafting"*. This is not a pleading whose excellence I feel able to commend. The more closely one studies this schedule, the more difficult it becomes to disentangle what claims Multiplex are putting forward in respect of non-completion of design and drafting for the permanent works.
13. Cleveland Bridge, in section 6 of their opening note, have analysed schedule 4C as comprising eight separate claims, three of which have migrated from schedule 4D. Cleveland Bridge tabulate those eight claims in a table on page 161 of their opening note. I shall refer to the elements of schedule 4C using the claim numbers which Cleveland Bridge have assigned to them.
14. Claims 1 to 5 of schedule 4C are as follows.
Claim 1 is a claim for understanding the status of design and drafting as at 2nd August 2004, engaging a team to complete the design and drafting, carrying out such drafting as could be done in August to September 2004.
Claim 2 is a claim for managing and controlling the design and drafting team between October 2004 and March 2006.
Claim 3 is for completion of bowl connection design (ie completing connections not designed as at 2nd August 2004, and amending and resubmitting any connection designs at B or C status at 2nd August 2004), between October 2004 and March 2006. This claim is also for completion of bowl drawings between October 2004 and March 2006.

Claim 4 is for design and drafting work to ensure that remedial works (described in schedule 1D) were properly carried out on site between October 2004 and March 2006.

Claim 5 is for completion of roof connection design and drawings between October 2004 and March 2006.

15. For present purposes it is not necessary to summarise claims 6 to 8, which have migrated across from schedule 4D.
16. The damages which Multiplex claim in respect of claims 1 to 5 are the sums paid to Hollandia for carrying out the various items of work. In each case Multiplex plead the sums certified as due for that work in certificate 22 dated 31st March 2006. Multiplex then make a small discount from the certified sum to reflect a commercial deal which was struck between Multiplex and Hollandia on 7th April 2006.
17. For present purposes it is necessary to focus in a little more detail on claims 3 and 4 of schedule 4C.
18. Claim 3 is set out in paragraphs 23, 24, 25, 26, and the first half of paragraph 27 of schedule 4C. It will be recalled that this is a claim for completing the design of the bowl. The sums due to Hollandia for this design work are said to be £179,566 as derived from certificate 22. The relevant costs totalling £179,566 are set out in appendix 4A to schedule 4C.
19. Appendix 4A is a schedule listing each week from 1st October 2004 to 30th June 2006. The schedule shows the number of hours work attributable to this head of claim in each week. Finally, the total figure of £179,566 is discounted by Multiplex to £172,623 in order to reflect the compromise negotiated on 7th April 2006.
20. Claim 4 is set out in the second half of paragraph 27 together with paragraphs 28 and 29 of schedule 4C. It will be recalled that this is a claim for design work related to remedial work on site. Indeed, the further information served by Multiplex on 14th September 2007, at response 166, makes it plain that the design work the subject of claim 4 is specifically linked to the defective steelwork of which complaint is made in Scott Schedule 1C. Indeed, at first blush it is somewhat difficult to see what is the connection between claim 4 and the subject matter of schedule 4C.
21. The sums due to Hollandia for the remedial design work comprised in claim 4 are said to be £996,771, as derived from certificate 22. The relevant costs totalling £996,771 are set out in appendix 4B to schedule 4C.
22. Appendix 4B is a schedule with six columns which, for ease of reference, I have numbered in my bundle 1, 2, 3, 4, 5 and 6, starting of course on the left-hand side. Column 1 is headed "Date" and in column 1 is a list of dates at the start of weeks. Column 2 is headed "Week Number", that shows the week number in each calendar year. Column 3 is headed "Item". Column 4 is headed "Hollandia Site". Column 5 is headed "Wembley Site". Column 6 is headed "Invoice Total".
23. The total figures at the bottom of the columns are as follows. The total of column 3 is £516,589. The total of column 4 is £19,716. The total of column 5 is £460,465. The total of column 6 is £996,771. That last total is the grand total of all the items in appendix 4B.
24. Finally in claim 4, the figure of £996,771 is discounted to £958,232 in order to reflect the compromise of 7th April 2006.
25. Although much more could be said about schedule 4C (and in due course attention may focus upon appendix C) this summary will suffice for present purposes. I must now turn to the application to amend.

PART 3. THE APPLICATION TO AMEND

26. Multiplex seek permission to amend the financial claims made in schedule 4C. The most substantial amendments sought are in respect of claims 3 and 4. Multiplex seek to increase claim 3 from £172,623 to £896,756. Multiplex seek to reduce claim 4 from £958,232 to £500,645.
27. The draft amended pleadings do not include any amended versions of appendix 4A or appendix 4B. It is quite impossible to glean from the draft amended pleadings why the values of claims 3 and 4 have changed so dramatically. Cleveland Bridge state in their skeleton argument that with the assistance of their expert they have studied the proposed amendments to claims 3 and 4 and that they find those amended claims to be incomprehensible.
28. Although in the past I have been sceptical about both parties' claims not to understand the other side's pleadings, on this occasion I am not sceptical. Draft amended claims 3 and 4 are, on their face, incomprehensible. Mr Paul Buckingham, Multiplex's counsel, valiantly did his best to explain the amendments, but even he could not resolve the ambiguities, despite being granted two adjournments to take instructions during the course of yesterday.
29. In outline, the explanation given by Mr Buckingham for amended claims 3 and 4 may be summarised as follows. The heading of column 3 of appendix 4B to schedule 4C, which reads "Item", in fact means work done by Oakwood on variations originating before 15th February 2004. Accordingly, all of the entries in column 3 should be transferred from claim 4 to claim 3. Furthermore, the response given by Multiplex to request 166 in the further information served on 14th September 2007 is incorrect. Paragraph (c) of that response asserts that the design work in claim 4 was carried out by:
"(1) Oakwood personnel based in its office ...
"(2) Oakwood personnel based at Hollandia's offices ...
"(3) Oakwood personnel based on site."

30. Mr Buckingham now states, on instructions, contrary to that response, that only Oakwood personnel based upon site were engaged upon remedial design work; the other two categories of Oakwood personnel referred to in response 166 paragraph (c) were engaged upon completing the design of the bowl. In other words, all the design work done by Oakwood personnel in categories 1 and 2 should be assigned to claim 3 and not claim 4.
31. Mr Buckingham adds that a fuller and more precise explanation of amended claims 3 and 4 can be gleaned from the following appendices to the report of Dr Mastrandrea, who is Multiplex's expert: appendix 2A, appendix 2.1, appendix 2.3, appendix 2.4A and appendix 2.4B.
32. The next amendment which Multiplex seek to make to schedule 4C concerns the hourly rates paid to Hollandia. The new rates which Multiplex propose to plead are explained in paragraphs 3.6 to 3.10 of Dr Mastrandrea's report. Dr Mastrandrea explains that he has derived these rates from "an electronic copy of the final account with Hollandia". These new rates are set out in appendix 2 to Dr Mastrandrea's report. Dr Mastrandrea has added a 10 per cent mark-up, which was agreed between Multiplex and Hollandia. He has also included some expenses which were previously omitted.
33. Cleveland Bridge, for their part, consent to the amendment adding a 10 per cent mark-up to Hollandia's charges, insofar as that mark-up was previously omitted from Multiplex's pleadings. Cleveland Bridge oppose all of the other amendments which I have summarised above.

PART 4. DECISION

34. Let me deal first with the substantial increase in claim 3. This claim is increased by approximately three-quarters of a million pounds from what was (in the context of this litigation) a fairly modest sum. Such an increase is self-evidently prejudicial to Cleveland Bridge, because Cleveland Bridge have hitherto concentrated their efforts on the more substantial claims.
35. The second reason why the proposed amendment, which quadruples the size of claim 3, is prejudicial is this. Cleveland Bridge have taken Multiplex's pleadings at face value, interpreted them as best they could and invested substantial effort and resources in responding to the claims, especially the larger ones. See, for example, Mr O'Neill's analysis of claim 4 and Mr Taylor's analysis of claim 5. In preparing their response, Cleveland Bridge could not possibly have guessed the true meaning of column 3 in appendix 4B as disclosed yesterday by Mr Buckingham (after an adjournment during which that revelation was vouchsafed to counsel). Nor could Cleveland Bridge possibly have guessed that Oakwood's timesheets should all be interpreted in a manner different from that set out in response 166(c) of Multiplex's further information.
36. This trial has now been in progress for two weeks. There is much to be done on all aspects of the case over the Easter break. It is not realistic to expect Cleveland Bridge to undertake a comprehensive re-analysis of, and response to, the proposed revised and expanded claim 3.
37. The third reason why the proposed amendment to claim 3 prejudices Cleveland Bridge is this. The report of Dr Mastrandrea and its appendices are meant to provide detailed backup to, and support for, the amendments. Unfortunately, however, Dr Mastrandrea's appendices are riddled with puzzles and ambiguities. Ms Lucy Garrett, counsel for Cleveland Bridge, took me through these matters yesterday at some length and they can be gathered from the transcript of yesterday's hearing. In his submissions in reply Mr Buckingham, who fought his cause valiantly, was simply unable to explain the mysteries and ambiguities of those appendices. It is not right that in the middle of a trial Cleveland Bridge should have to deal with an amended case the details of which are so obscure.
38. Let me turn now to claim 4. The amendments which Multiplex propose to claim 4, although reducing its size by £450,000, change the whole character of claim 4. These amendments will present Cleveland Bridge with similar difficulties to those just identified above. The work which Multiplex have done in relation to claim 4 in its present form cannot simply be recycled and presented as a defence to amended claim 3. Claim 3 and claim 4 are of a fundamentally different character to one another. Claim 3 is a claim arising out of Cleveland Bridge's repudiation and consequent failure to complete the design of the permanent works for the bowl. Claim 4 is parasitic upon a claim for defects which is pleaded elsewhere.
39. I have come to the conclusion that the amendments which are sought to both claims 3 and 4 will cause serious prejudice to Cleveland Bridge. If those amendments are allowed, they will generate a substantial amount of extra work which Cleveland Bridge do not have time to undertake. Furthermore, those amendments will substantially affect the cross-examination of Multiplex's witnesses, which will commence immediately after the Easter break.
40. Let me now draw the threads together. For the reasons set out above, and in the exercise of my case management discretion, I have come to the conclusion that Multiplex should not be permitted to make the amendments which are sought in respect of claim 3 and claim 4 of schedule 4C.
41. I turn next to Multiplex's application to amend the rates of payment to Hollandia as pleaded in schedule 4C. The proposed amended rates of payment are set out in appendix 2 to Dr Mastrandrea's report. These new rates are said to have been derived from an electronic copy of Hollandia's final account, which apparently is different from the hard copy final account. Cleveland Bridge assert that the electronic copy of Hollandia's final account has never been disclosed to them, so that Cleveland Bridge have no way of investigating the proposed new rates.

42. I asked Mr Buckingham yesterday afternoon whether Multiplex had ever disclosed any paper or electronic document containing the proposed new rates. In response Mr Buckingham drew my attention to a letter in the solicitors' correspondence bundle, dated 14th February 2008, from Multiplex's solicitors to Cleveland Bridge's solicitors, enclosing some documents.
43. I am bound to say that in litigation which has been running for about four years, it is not opportune to wait until a month before trial and then disclose the rates of payment which are claimed.
44. Despite the unorthodox manner in which Multiplex have brought forward this part of their claim, I have come to the conclusion that the amendment in respect of rates is one which Cleveland Bridge can accommodate without suffering undue prejudice. The rates which Multiplex now propose to rely upon are those set out in appendix 2 to Dr Mastrandrea's report. Whether those rates should be accepted by the court, as a basis for assessing any damages which may be recoverable, will be a matter for investigation during the evidence and for debate in closing speeches. Points may be made about the late appearance on the scene of these rates or about the obvious conflict between these rates and those in certificate 22. I do not believe, however, that dealing with matters such as this will generate substantial extra work for Cleveland Bridge.
45. I have come to the conclusion, applying the principles set out in Part 1 above, that Multiplex should be permitted to amend the rates pleaded in schedule 4C as sought, in accordance with appendix 2 to Dr Mastrandrea's report. Multiplex should be allowed to include the 10 per cent mark-up where that mark-up was previously omitted.
46. I turn next to the claim for expenses. Multiplex have not condescended to particulars in respect of the expenses claimed. It is not clear what the expenses are or what they are for. An amendment which is not properly particularised should not be allowed at this late stage. Therefore, I do not allow the amendment in respect of expenses.
47. Finally, I should say a word about schedule 4D. This is Multiplex's claim for damages arising out of Cleveland Bridge's failure to complete the design and drafting of temporary works and erection engineering. Multiplex should be permitted to make the same amendments to the rates claimed in schedule 4D as in schedule 4C.

PART 5. CONCLUSION

48. I have previously expressed concern that this litigation is being conducted in a disproportionate manner. Most litigants in the Technology and Construction Court adopt a commercial approach to dispute resolution. Once they have obtained the court's decision on liability and on questions of principle, litigants usually agree upon valuation and similar matters in order to limit costs. In the present case that is not the approach of the parties, despite having litigated both at this level and in the Court of Appeal 11 preliminary issues. Instead, vast and disproportionate costs have been incurred, and continue to be incurred, in litigating about matters which cry out for sensible resolution and compromise.
49. I now return to the present application to amend. I regret to say that despite the huge expenditure of costs on this litigation, those parts of Multiplex's pleadings which came under scrutiny yesterday are a shambles from which it is only possible partially to rescue Multiplex by amendment. This application to amend is allowed to the extent indicated in Part 4 above.

MR R STEWART QC, MR P BUCKINGHAM and MR G SCOTT HOLLAND (instructed by Clifford Chance LLP) appeared on behalf of the Claimant.
MR A WILLIAMSON QC, MR S HARGREAVES and MS L GARRETT (instructed by Reid Minty LLP) appeared on behalf of the First and Second Defendant.