

CA on appeal from TCC, Mr Recorder Uff QC, before Brooke LJ, VC, Sedley LJ; Jacob LJ. 6th February 2004.

JUDGMENT : Lord Justice Jacob :

1. By our judgment of 16th December 2003 we dismissed the 1st defendant's appeal altogether. We allowed that of the 2nd defendant in relation to Projects 1, 2 and 3, but not in relation to Project 4. We did not deal fully with costs on that day. This was because leading counsel for the defendants was unavailable due to a public duty and it was submitted by junior counsel that the question of costs involved such intricacy that it was desirable the point should be argued by his leader. We acceded to a request to adjourn the question of costs, whilst making an interim order that the 1st defendant should pay £160,000 on account of its liability by 30th December. We indicated that we would decide whether to receive oral submissions following the receipt of written submissions which we ordered.
2. We have received those written submissions. We are told that there was no payment of the interim costs we ordered. Nor has there been any explanation as to why not. On 6th January we received one and a half page written submissions on behalf of both defendants. These raise no points that were not aired at the hearing on 16th December. The submissions conclude with a request for an oral hearing but no indication is given as to why one is necessary or desirable. The claimants made their written submissions in response on 12th January. They oppose a further hearing saying it would result in further unnecessary expense.
3. We agree that no further hearing is necessary. It would involve further expense and delay and there are no new points to consider.
4. We turn to the question of the 2nd defendant's costs. It is submitted that he having won in relation to all but the minor Project 4, should have his costs. We do not agree. From the outset he joined forces with the 1st defendants on their defence. It was that defence which occupied nearly all the time both at first instance and appeal. Having run that defence and lost, he must pay the costs of it. We have considered whether there should be any reduction in respect of the distinct point concerning his personal liability but have concluded there should be none – it involved no further evidence and the time taken over argument upon it was trivial compared with the overall time involved.
5. The 1st defendants suggest they should not have to pay the costs of the dispute about the 2nd defendant's liability. We reject that for the same reason as we refuse a reduction concerning the 1st defendants' liability.
6. It follows that the liability of the 2nd defendant is joint and several with that of the 1st defendant. Moreover the interim order as to costs should also apply to him. So we direct that the 2nd defendant must pay the sum of £160,000 (less any amount paid towards that sum by the 1st defendants) by way of interim costs, such sum to be paid within 14 days of this judgment.
7. The claimant in his reply submissions suggested we should increase the interim sum by £40,000. We do not think this appropriate. It was only asked for in reply. Moreover we settled on an appropriate sum at the December hearing and the amount of further costs involved in the written submissions (which costs should be the claimant's) cannot be particularly significant.
8. The claimant further suggests that by reason of the failure to pay the interim order for costs, judgment should be entered in his favour in accordance with the decision on the preliminary issues. In particular the point is made that the defendants have indicated they may apply to plead a limitation defence which, they say, would nullify or near nullify the determination as to liability. We do not think we should make any such order. It is essentially one for the trial judge as to whether an amendment should be permitted at all and if so on what terms. There seems to be no reason in principle why he should not, if he is minded to permit amendment, impose as a precondition payment of the costs to date and actual payment of the sums ordered to date.
9. Meanwhile, if the interim costs orders are not satisfied, the claimant will have his ordinary remedies against each defendant.
10. The order I propose is therefore that:
 1. The judge's order as to costs below is to remain undisturbed

2. The claimant is to have his costs of the appeal against both defendants including the costs of post-judgment written submissions.
3. The costs are to be assessed.
4. The 2nd defendant is to pay £160,000 (less any amount already paid towards such sum by the 1st defendant) by way of interim costs, such payment to be made on or before 19th February 2004.
5. All further proceedings are remitted to a Judge of the Technology and Construction Court, if possible the same trial judge.

Lord Justice Sedley: I agree

Lord Justice Brooke: I also agree.

Peter Coulson QC and Alex Hill-Smith (instructed by Dean and Dean) for the Appellant
Stephen Males QC and David Lewis (instructed by Davies Battersby) for the Respondent