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High Court makes costs management order even after warring parties have run up £1.8million in trial preparation costs

Signia Wealth Ltd v. Marlborough Trust Company Ltd & Ms Nathalie Dauriac-Stoebe
[2016] EWHC 2141 (Ch)

Article by David Bowden

The High Court has ordered that costs budgeting be applied to in a multitrack case which at most has a value of £13million. By the date of the case management conference hearing, costs had already been incurred of £1.75million. The estimates were that costs of over £4.1million would be incurred in going to trial. The judge ruled that proportionality was engaged and there was a real benefit in ordering costs budgeting. He refused to order a split trial on the valuation of the shares and the business. Instead he ordered the defendants to produce their expert evidence on this first.

Signia Wealth Ltd v. Marlborough Trust Company Ltd & Ms Nathalie Dauriac-Stoebe
[2016] EWHC 2141 (Ch) 12 July 2016
High Court of Justice, Chancery Division (Chief Master Marsh)

What is this dispute all about?
The 2nd defendant (Ms Dauriac-Stoebe) was previously the chief executive of the claimant. Her employment was terminated. The claimant brought this action seeking declarations concerning the ending of that employment and whether the 2nd defendant is entitled to be paid for shares she held in the company. The court will have to decide whether she was a 'good leaver' or 'bad leaver' as defined in the company's articles of association. The 1st defendant is the trustee of a family trust which held shares in the claimant company beneficially. The 2nd defendant also seeks to bring 2 others into the action alleging that they conspired against her. The court will have to determine what effect the 2nd defendant had on the claimant's financial position it being alleged that her performance had an adverse effect. The value of the claim is put at £13million.

What were the issues the High Court was asked to address?
There were these 3 issues for the judge:

- Should costs budgeting apply to this case?
- Should there be a split trial to determine the share valuations first?
- How should expert evidence be exchanged?

How much costs had the claimant already incurred and estimated it would run up in preparing for trial?
By the date of the case management conference, the claimant filed a costs budget dated 4 July 2016. It had already incurred costs of £967k. It estimated it would incur a further £1.374million in costs up to the end of trial. Its budget for disclosure alone was £0.5million.

How much costs had the defendants already incurred and estimated they would run up in preparing for trial?
In similar vein, the defendants' filed their costs budget dated 5 July 2016. They had already incurred costs of £776k. It estimated they would incur a further £1million in costs up to the end of trial. The total of both sides' costs budgets was therefore for £4.14million.

What does the Jackson version of the CPR say about costs management?
CPR part 3.12 provides that costs management will apply to all multi track claims with only these 5 exceptions:

> **'3.12 Application of this Section and the purpose of costs management**
> *(1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except—*
> *(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more, or*
> *(b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more, or*
> *(c) where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders), or*
> *(d) where the proceeding are the subject of fixed costs or scale costs, or*
> *(e) the court otherwise orders*.'

Why had their not been a costs management conference earlier in this case?
There was some inconsistency in the correspondence. The claimants initially said because it was not specified that the claim had a value exceeding £10million it was not automatically taken out of costs budgeting. The defendants said that because the value they put on the case was over £10million, it was outside the costs management regime. However when the defendants found out how much the claimant had clocked up on costs, they changed their mind then stating that '*costs management was desirable*'. Although a case management conference was listed for March 2016,

this was taken out of the list. So it took over 1 year from the issue of the claim for the court to consider costs management.

What factors did the judge consider were relevant on costs?
The judge considered these 6 factors were relevant as to whether he should now order costs management:

- The nature of the claim,
- The size in absolute terms of the costs,
- The costs already incurred as against those yet to be incurred,
- Inequality of arms,
- Differences in size between both sides' costs budgets, and
- Whether there are any positive reasons why costs management is desirable.

What ruling did the judge give on costs?
He said '*to my mind it is plain that issues of proportionality are engaged'*. Weighing these 6 factors up, the judge, the judge ruled that: '*there are issues of proportionality which are engaged and which need to be considered. Overall, it seems to me that there is likely to be a real benefit for the parties if there is a cost management order and I propose to give directions for a costs management conference to be held on the earliest available date*'.

Are there any other authorities of relevance?
There is only 1 authority which is relevant on split trials.

> *Electrical Waste Recycling Group Ltd v. Phillips Electronics UK Ltd* **[2012] EWHC 38 (Ch)** (Hildyard J)
> The starting point is the over-riding objective and the court should manage as many issues as it can at one hearing. The decision on split trials is essentially a pragmatic one taking into account a range of issues that will each be bespoke for the particular case.

What factors did the judge consider were on ordering a split trial?
The judge considered these 5 factors were relevant as to whether he should order a split trial:

- The parties' estimates of the length of trial both with and without expert evidence,
- If there is a split trial, how would this impact on the length of the main trial,
- The court's listing process and the delay in listing both trials,
- Would significant costs be saved by ordering a split trial,
- What additional cost would be generated if the 2nd trial still remains necessary anyway?

How did the judge weigh up these factors on deciding whether to order a split trial?
On the facts in this case, the judge found that these were his observations on the *Electrical Waste* factors:

- Are there advantages or disadvantages in terms of trial preparation?
- Will there be '*unnecessary inconvenience and strain on witnesses if 2 trials are ordered?*'
- Would a single trial '*lead to excessive complexity and burden'* on the trial judge?
- Would a split trial cause prejudice, and
- Is a clean split possible?

What ruling did the judge give on a split trial?
Weighing these factors up, the judge, the judge ruled that: *'I am satisfied that this is not an appropriate case in which to order a split* trial'. In particular he was concerned that:

> 'Plainly, it will be of assistance to the court to have expert evidence before it about the valuation of the shares, which of course will be placed upon a valuation of the company. Secondly, there is a significant part of this case which concerns the second defendant's performance and the effect that has had on the company. Again, it seems to me to separate out of that issue and to require it to be dealt with solely at a second trial, is unsatisfactory.'

What ruling did the judge give about the exchange of reports from expert witnesses?
The judge ordered the defendants to produce and serve their expert evidence as to valuation of the shares and the business first. After this, the claimant is to produce and serve its expert evidence sequentially. He said that ''*it seems to me it gives the defendants a positive advantage in laying out the field for valuation and, secondly, this is a case where the court and the claimant need to know precisely what the defendants' case on valuation is.'*

He optimistically noted that:

> *'it may well facilitate the possible resolution of this claim and it may… achieve a saving so that there are not two experts undertaking precisely the same exercise, producing lengthy valuation reports which overlap. I would not encourage the claimants to provide a merely responsive report, but seeing the defendants' expert's report in advance, will enable them to provide a targeted and measured response to it, with a full understanding of the way in which the defendants approach the case.'*

What lessons can be learned from this case?
At first blush it seems odd to order the defendants to produce their expert evidence first. However it seems both sides were always in dispute about this and were never going to resolve this amicably. Signia Wealth seized the initiative in bringing the action seeking declarations as to whether the 2nd defendant had any entitlement to compensation. So in reality the 2nd defendant was the real claimant and judged against that backdrop the decision on expert evidence is not unusual at all.

The judge ordered sequential exchange of expert reports. Although the court rules now provide for the so-called 'hot tubbing' of experts in paragraph 11 of the practice direction to part 35 of the CPR, this is not what is going to happen in this case. The CPR more conventionally provides in CPR 35.12 that the court may order discussions between experts. Here though, the judge specifically says he does not want '*two experts undertaking precisely the same exercise, producing lengthy valuation reports which overlap'*. Instead the judge's approach is for the defendants to lead on expert evidence and then for the claimant 'to provide a targeted and measured response' to it. No doubt uppermost in his mind was the desire to contain costs.

Finally, whoever wins this case is still unlikely to recover all their costs from the other. The judge has noted that proportionality is engaged. In recent assessments, such as *May and Dobson* **[2016] EWHC B16 (Costs)**, a costs judge having assessed what costs are reasonable or '*proportionate to the matters in issue*', has still gone on to slice off a yet further significant chunk of the bill where it is felt that the costs incurred were not proportionate as '*not bearing a reasonable relationship'* to the claim. Perhaps for this reason the judge noted that '*this type of case cries out for a resolution'*.

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