



Neutral Citation Number: [2024] EWHC 1159 (TCC)

Case No: HT-2023-000349

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (KBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 16/05/2024

**Before :**

**NEIL MOODY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT**

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**Between :**

<b>ISG RETAIL LIMITED</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>FK CONSTRUCTION LIMITED</b>	<b><u>Defendant</u></b>

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**Simon Hale (instructed by Mantle Law (UK) LLP for the Claimant**  
**Simon Hargreaves KC and James Frampton (Addleshaw Goddard) for the Defendant**

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**JUDGMENT**  
**ON CONSEQUENTIAL MATTERS**

This judgment was handed down remotely at 10.30am on Thursday 16<sup>th</sup> May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## NEIL MOODY KC:

1. I handed down judgment in this case on 18<sup>th</sup> April 2024: see [2024] EWHC 878 (TCC). By that judgment I declined to make any declarations in these Part 8 proceedings. I am now asked to rule on two consequential matters: (a) whether the proceedings should continue under Part 7, and (b) costs. I have received helpful written submissions on these points and the parties are agreed that I should decide them on the papers.

### Transfer to Part 7?

2. CPR Part 8.1(4) provides:

The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.

3. There appears to be little guidance on the exercise of this power. The *White Book* at 8.1.1 states:

Rule 8.1(4) permits the court to order a claim to continue as if the Pt 8 procedure had not been used, for example in a case where a Pt 8 claim has been issued in the mistaken belief that there would be no substantial dispute of fact. In such a case the court will order that the claim continues as a Pt 7 claim, allocate to track and give directions.

4. In *Sleaford Building Services v. Isoplus Piping Systems Ltd* [2023] EWHC 969 (TCC) at [71] Mr Alexander Nissen KC sitting as a Deputy Judge dismissed Part 8 proceedings and required the claimant to start again where “not much, if any, of the current Particulars of Claim would remain”. More recently, in *TClarke Contracting Limited v Bell Build Limited* [2024] EWHC 992, Pepperall J ordered a Part 8 claim to proceed under Part 7 in circumstances where the use of Part 8 was “laden with risk”. It is not entirely clear from the report, but it is reasonable to infer that the claim in that case would have required substantial re-pleading. The Defendant had already filed a defence. FK say that enquiries with counsel in that case have confirmed that the Defendant did not seek dismissal, only that the proceedings should be transferred to Part 7.

5. As I observed in *Berkeley Homes (South East London) v John Sisk and Son Ltd* [2023] EWHC 2152 (TCC) at [11], the power under CPR 8.1(4) is essentially a case management power to be exercised in accordance with the overriding objective. It seems to me that all the relevant circumstances should be taken into account, but I regard the following factors as particularly relevant in deciding whether a claim should proceed under Part 7:

- i) Whether this is likely to save or increase costs;
- ii) Whether this is likely to promote or delay the resolution of the proceedings;

6. In this case, FK urges the dismissal of the Part 8 proceedings. It says that very little will be left of ISG’s pleading and so ISG should start again by issuing fresh proceedings under Part 7. ISG says that it should be permitted to serve revised

Particulars of Claim and seeks directions for service of statements of case and the listing of a case management conference. ISG accepts that its pleading will require revision but points out that much of the substance of the argument between the parties will be pleaded in FK's Defence and ISG's Reply. ISG also points to the fact that much work on the merits has already been done by both parties.

7. I accept that ISG's statement of case is likely to require substantial revision and expansion. Nonetheless the document seems to me to be a reasonable foundation on which ISG can base its Part 7 proceedings. On balance I consider that dismissing these proceedings and requiring ISG to start again is more likely to lead to some delay and increased costs when compared with transferring the current proceedings to Part 7. If I dismiss the proceedings, the litigation timetable will go back to square one, whereas if I transfer the case the Court will remain seised of the matter and I can give directions which may facilitate a more expeditious resolution.
8. Accordingly, I will order that these proceedings are transferred to Part 7. ISG's revised Particulars of Claim should be served by 7<sup>th</sup> June 2024, and FK's Defence by 5<sup>th</sup> July 2024. Any Reply should be served by 2<sup>nd</sup> August 2024. ISG should apply for a case management conference on the first open date in Michaelmas term. An early CMC will enable the parties and the Court to assess the extent to which disclosure and witness evidence will be required in the resolution of this claim.

### Costs

9. FK seeks its costs of the Part 8 proceedings and ISG does not oppose that. Both parties are content with a summary assessment and I consider this to be appropriate: see CPR 44 PD 9.2(b). At the hearing, FK lodged a total bill for £191,506.30 of which £69,381.90 was solicitors' costs and £121,759 was the cost of leading and junior counsel (of which £85,000 was for the hearing). FK has now lodged an increased bill taking account of costs incurred up to and including addressing these consequential matters. The total now is £213,142.65 which includes an additional £12,149 for counsel and £9,487.35 for solicitors' time.
10. ISG's total bill up to and including the hearing is for £115,001.70 of which £50,950 is solicitors' costs and £62,233 is the cost of leading and junior counsel (of which £53,000 was for the hearing).
11. FK has volunteered that a reasonable figure for the summary assessment of its own costs would be £149,199.86, being 70% of its total costs.
12. When assessing costs summarily I bear in mind in particular CPR 44.3(5) and 44.4(1) (a). As Fraser J (as he then was) observed in *RG Securities (No 2) Limited v Allianz Global Corporate and Speciality CE* [2020] EWHC 2047 (TCC):

“A figure awarded by way of summary assessment is simply that - a summary assessment. It is not an item by item detailed assessment, and this ruling should not be taken as constituting one. The figure awarded by the court is not intended to be a full indemnity to the party receiving its costs, and some deduction from the overall total is justified. Costs have to be proportionate and reasonably incurred, and proportionate and reasonable in amount, as this is a requirement under CPR Part 44.4(1)(a).”

13. I note the following features of this case. I understand that the prolongation costs were valued at £4,687,815, so this appears to be the value of the underlying dispute. It is part of a much larger dispute between the parties. The Part 8 claim led to a one-day hearing. It was a case of some factual and technical complexity which led to a reserved judgment. There were two trial bundles, but much of the material was not referred to. A large number of cases were cited, but most were not referred to. Whilst costs assessment is not a comparative exercise, I note that ISG's schedule amounts to about 60% of FK's original schedule.
14. ISG submits that FK's costs are much too high. FK submits that its figures are reasonable and proportionate but – as I have indicated - has offered to accept 70% of the overall total. ISG proposes that FK's costs should be summarily assessed at £85,000.
15. ISG criticises FHK's hourly rates, but I note FK's analysis showing that the rates overall are comparable.
16. FK say that, although ISG was the Claimant, FK bore the burden of establishing that the case was in fact more complicated than ISG's "overly simple" approach suggested. I accept that FK had to do more of the "heavy lifting". I note also that FK had to change leading counsel as their original counsel was not available when ISG pressed for an earlier hearing date.
17. I recognise that litigation in this field engages lawyers with a high degree of specialist and technical expertise and that is reflected in the fees charged. Nonetheless, I consider FK's counsel's fees to be very high. They are almost double ISG's counsel's fees, even though the leaders are of comparable seniority.
18. FK appear to have engaged a team of nine fee earners including two paralegals and two costs advisors. I consider that £45,079 spent on documents (now increased to £50,538) is disproportionate, given the reliance on counsel. Of this, I note that £8,112 was incurred on instructions to counsel, and £11,237 on preparation for the hearing. An additional £3,664 is claimed for strategy for the hearing.
19. In my judgment FK's costs overall are too high and are disproportionate. Having regard to the points made above, I consider it reasonable to reduce the solicitors' time spent on documents to £25,000. This gives a total for solicitors' costs of £53,331, which I round down to £53,000.
20. As for counsel's fees I consider that the close approximation in seniority between the parties' Leading Counsel provides a good guide to a proportionate level of fees, but I accept that FK had to do much most of the running in this case and that FK had to instruct a new leading counsel. Overall I allow counsel's fees of £80,000.
21. Accordingly, I summarily assess FK's costs at **£133,000**. A cross-check against ISG's total of £115,001 confirms that this is a reasonable and proportionate figure.
22. The parties should agree and lodge an Order giving effect to this judgment within 7 days.