Case No: HT-2019-000259
Neutral Citation Number: [2021] EWHC 1795 (TCC)

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 9 April 2021

BEFORE:

MR JUSTICE WAKSMAN

BETWEEN:

ENERGY WORKS (HULL) LIMITED

Claimant

- and -

(1) MW HIGH TECH PROJECTS UK LIMITED

(2) M+W GROUP GMBH

Defendants

MW HIGH TECH PROJECTS UK LIMITED

Part 20 Claimant

- and -

OUTOTEC (USA) INC

Part 20 Defendant

MR S DENISON QC appeared on behalf of the Claimant
MR V MORAN QC appeared on behalf of the Defendant
MR A WILLIAMSON appeared on behalf of the Part 20 Defendants

APPROVED JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

MR JUSTICE WAKSMAN:

1. This is an application made by the two defendants, to which I shall refer as M&W, to adjourn the trial of this matter which is due to commence on 8 June and finish at close of business on Wednesday 7 July, which includes two days reading and then 16 sitting days.

2. The claimant is Energy Works (Hull) Limited which opposes the adjournment. I will refer to it as EWH. The third party to a contribution and related claim made against it by M&W is Outotec. It also objects to this application.

3. I will need to delve into the procedural history in some detail later on but let me simply say this by way of introduction. The proceedings were issued in summer 2019. When they first came before the deputy judge in October 2019, EWH was actually pressing for an expedited trial in July of 2020. The reason for that was because there was a bond or a similar document on which it could rely for payment of any valid claim but which would be time expired towards the end of 2020. The deputy judge was inclined to find space for a trial in 2020 if it was available but it was not. Accordingly, in October 2019 this trial date was set.

4. The shape of the case going forwards for trial was, in my judgment, essentially set out and agreed in a hearing before O'Farrell J towards the end of 2020. The claims were to be expanded by way of amendment. It was likely, having regard to the increased claims, that there would be more than the 14 witnesses originally contemplated for all parties, although there was no precise figure or indication given at that time. Effectively, the shape of the case was set at that point. O'Farrell J granted the relevant permissions. She also refused an application by M&W then to adjourn this trial.

5. I will come back to what happened after that but in my judgment it cannot on any realistic basis be suggested that the actual issues between the parties have increased. Quite the reverse. In a number of significant respects they have decreased. Let me just then simply say where we are.

6. By a series of consent orders the following were agreed between the parties following disclosure on 21 December of last year. That is to say, that witness statements were to be provided by 5 February. That has been done. There have been supplemental signed witness statements on 5 March. That has been done. The expert reports, most of those were to be provided by 12, 17 or 26 March. All that has been done. What is left are the delaying technical expert reports in reply due on 15 April and a quantity surveying and forensic accountancy first reports to be provided by 4.30 pm on 16 April. Both of those events are next week. Then any reply quantum on quantity surveying and forensic accountancy to be by 30 April, so about seven weeks before trial.

7. Accordingly, the application to adjourn is not on the basis that there are key steps in terms of agreed directions which cannot be done before the trial. Almost all of them have been done. I should record that it is plain that all parties, but in particular the experts, have worked extremely hard to keep to that timetable for the purposes of this trial.

8. The application to adjourn is really made on two bases now. The first basis, which until I think a month or so ago had been entirely unheralded, is that the length of trial is too short to accommodate fairly the necessary examination of the lay and expert witnesses. That trial timetable in terms of length had been agreed as long ago I think as October 2019. On that basis it is said there should be an adjournment in any event. And/or the second reason is that even if adjustments could be made to facilitate what is said to be a slightly longer length of trial, the present position, however it is reached, is that it is not possible now to prepare properly for the trial in order to achieve a fair trial process, which, of course, is the ultimate aim with which I am concerned under the overriding objective.

9. Let me say at once that all of the parties helpfully provided to me some indicative timetables. The core point is this. M&W have said that the length of the trial needs to be extended by six sitting days. Mr Moran said of course they could have asked for longer, three months. I do not think that would have been met with much judicial enthusiasm and I take M&W at their word when they say another six days, and only another six days, is required.

10. Now it is time for me to say a little bit about what is and is not in issue in this case. Let me deal, first of all, with the main claim. That is to say the claim by EWH against M&W.

11. The vast majority of this claim, certainly as far as quantum is concerned, arises thus. The project was on any view delayed. M&W was the main contractor to EWH as employer for building a gasification plant which would involve the turning of refuse-derived fuel ("RDF") into useable energy.

12. The project should have been completed in 2018. By 7 January 2019, the maximum liquidated damages period had come to an end. Under the contract that then gave EWH the right to terminate the contract. It is common ground that if it was entitled to terminate when it did, then it would have claims not only for any accrued delays that had occurred along the way by way of liquidated damages, but, rather like a repudiatory breach, it would be entitled to claim the costs of now completing the contract with a different main contractor. It purported to exercise that right to terminate, or alternatively accept a repudiatory breach, on 4 March 2019.

13. So far as the relevant periods of delay are concerned, the delay experts agree now virtually everything in terms of what the actual cause of the delay was, although, of course, they are not engaged in the contractual consequences thereof.

14. Because EWH waited eight weeks between when it says its right to terminate accrued and when it actually exercised the right to terminate, the following is the position. If in relation to all the period of delay, which began on 1 October 2017 and ended on 4 March 2019, M&W could show that it was entitled to extensions of time, amounting to something over eight weeks, it would have a defence to the main contractual claim which relates to the losses incurred in extra costs to complete the contract and certain other matters.

15. There are only two relevant delay windows, being number 4 and number 6. Number 4 is the period 1 June 2018 to 14 August and the second is 9 November to 4 February 2019.

16. In relation to window 4 the experts are agreed on the extent of the critical delay and what the cumulative critical delay is, but, and this is the only disagreement they have, what the cause of that critical delay is. The claimant's expert says it is slow progress in the same way as it had been for other periods. The defendant's expert says that this was due to a dispute in relation to RDF. That is all about whether the defendant was entitled to take a stand on receiving compliance certificates for the RDF for the purposes of commission and matters of that kind.

17. If M&W can find more than eight weeks in those two periods the large contractual claims will essentially go, although there is a further string to the repudiatory breach bow which relates to an alleged refusal to perform in January 2019, itself constituting a repudiatory breach in any event.

18. The consequence of that for EWH is, it says, that, first of all, if it is right on liability then it is entitled to the costs of completing the contract. The contract is still not yet complete. As at the hearing before O'Farrell J it was thought that the contract would be completed in March of this year: 31 March is the date that everyone had been looking to. I am told that because of some problem that has just arisen that has not yet happened but I am told that it will happen in the next two weeks.

19. The original contract sum was about £153 million. The amount that was outstanding to M&W at the time of termination was £15 million. So, on one view, not very much, if anything, was left to be done. However, the claimant's claim in respect of the costs to complete is some £131 million. That includes the cost of starting afresh with a main contractor. The recovery of that sum is hotly disputed by the defendant even if it loses on liability.

20. I should add here that so far as the defendant's claim for extensions of time is concerned, it relies on a number of contractual breaches of contract on the part of EWH which it says would give it its entitlement to the relevant extensions of time.

21. The second and much more minor claim made by EWH against M&W is in relation to defective works. There are five defects which make up at least three-quarters of the total of £10 million claimed in this regard. I agree that in relation to many of the other

defects, some of which are extremely modest indeed, it is highly unlikely that much time will be taken with those at trial. Either the court will be asked to deal with them on paper and it will be largely a matter of contractual analysis or there may be some very short oral evidence. But in my experience those sorts of claims tend very much to fall by the wayside.

22. I should add here that M&W says that it anticipates there may be some amendments in relation to those claims for defects. If there are any they are not before me. I simply proceed on the current basis, which, as I say, is a claim for about £10 million.

23. So far as the cost of completion is concerned because completion had not taken place by the time this claim was launched it was not possible accurately to state what the actual costs were because they were still being incurred. I am told that invoices in relation to the costs of completion have been provided up to 30 December last year. What is now outstanding is for the final five months or so. There has been a lot of references to EWH's intended amendments as if there is some wholesale amendment around the corner. Mr Denison has been quite clear about that. The only amendment will be to alter the ultimate figure claimed for the costs of completion, which will replace the estimates which both sides experts have been going on for the latter period with actual costs. I do not think very much will turn on that difference since the experts have been agreed as to the actual expenditure of the money.

24. Insofar as M&W raise principled points as to why it has cost so much, I very much doubt that that is going to be altered in any significant way by replacing the recent estimated costs by the actual costs. I would not even call this an amendment. It is effectively simply an updated schedule of loss. I think that the spectre of amendments on the part of the claimant, as if there is some Pandora's box about to be opened in a week or two's time, has been greatly overstated.

25. The second element of the main claim are financing costs. This is a case where the project was being financed. The intention had been that the finance would be repaid at completion. Then EWH would start to take revenue from the completed project. As a result of the delay it says that it is now at least two years behind and it has been having

to pay very significant finance costs in the intervening period. It says that those financing costs form part of its losses.

26. I should add here that EWH makes this point should the trial be adjourned. That M&W has relied upon a contract clause which would limit any recoverable damages to £150 million on the basis of £130 million-odd on costs to complete, plus the defects, plus the finance costs. If that clause is effective, then the longer this dispute goes on unresolved the greater is the prospect, or indeed the certainty if the clause is valid, that EWH will be out of pocket.

27. If this trial was to be adjourned it could not come back until June of next year at the earliest. On that basis there would be likely to be one year's further financing costs, which, if the clause is valid, simply could not be recovered. When one bear in mind that I think the present financing cost claim is about £51 million for two years, or two and a bit years, one can understand the scale of that loss.

28. So far as M&W's third party claim against Outotec is concerned, there were an array of claims made against it originally and which were in play before O'Farrell J in July of last year. There were various delay claims which M&W sought to pass on, including some for liquidated damages, but because of developments quite recently all of those claims have now been abandoned. That, therefore, diminishes the number of issues and diminishes the extent of evidence which will be contested. The present position is that M&W's claim over against Outotec is relatively modest and it relies simply on the defects claims, or some of them, being passed over.

29. Outotec for its part, however, has a significant claim against M&W for payment as a subcontractor for milestones in relation to the work which it says it has done but for which it has not been paid.

30. I should add that M&W itself has a counterclaim against EWH.

31. That is the shape of the claim now. On any view, it has reduced in scope rather than increased in scope since the matter was before O'Farrell J on the last occasion.

32. Let me then deal with the procedural history. I will try to embed within this a number of points concerning disclosure which relate to arguments that have been made before me today.

33. First of all, all the parties had their case before O'Farrell J, as I have indicated, and M&W unsuccessfully applied for an adjournment.

34. What then happened was that disclosure was due at the beginning of November. There was a short extension until the middle of November but at that point M&W applied to the other parties for an extension for disclosure which would have a knock-on effect on witness statements until January of this year. There is no doubt on the evidence that the reason for this was nothing to do with EWH or Outotec, but was as M&W accepted at the time, and Mr Moran accepted before me, that it was simply not in a position to deal with its disclosure because it was not ready. The firm impression I have was that it was leaving things very late for reasons which I do not know, but it frankly said that it was unable to deal with disclosure matters. The other parties were not prepared to allow an extension until January but ultimately one was agreed for 21 December.

35. It has also emerged, now that expert reports have been served, that at least one of M&W's principal experts was not engaged until late last year. If some of the points which M&W say they now wish to explore result from a late instruction of expert, who only now is suggesting further lines of enquiry, that is not a reason for an adjournment in my view.

36. The disclosure. Before the actual disclosure had been made there was the disclosure review document which had been discussed between the parties and agreed by October and then amended as necessary thereafter. It is an important document because it identifies all the key issues which both parties considered were in play for the purpose of disclosure and disclosure has been M&W's main linkage to the issues for today's purposes and the problem with a trial in June.

37. One of the key points which is relied upon by M&W is the role of what it says is non-compliant RDF, not merely in relation to what happened pre-termination, where it has been pleaded out as an issue, but in certain other respects as well. For example, or

perhaps in particular, as it is put in M&W's skeleton argument, there is a suspicion that the reason or a reason why the costs to complete are so great is because there was a problem in producing compliant RDF and that the system has had to be redesigned in a way which will take the RDF which is being supplied.

38. As to all of that, first of all, there is a pleaded case in relation to the costs of completion claim. So far as that is concerned, there is annexe 4 to the defence which deals with that. This is a document which again, as far as I know, was before the court in July, or certainly had been perhaps a little bit later than that, but certainly had been produced last year.

39. A number of specific points were positively put, including failure to mitigate in relation to the cost of completion. For example, that there were other subcontractors and EWH effectively did not take a firm enough line with them and allowed them all sorts of costs that they should not have done, that they allowed them not to follow their contractual obligations, that there was a collateral contract that should have been relied upon, matters of that kind. But in addition to that it is said in paragraph 11 in a rather negative fashion:

> "EWH is required to prove all matters alleged in appendix 6. Generally required to prove it has incurred all the costs."

40. Then in 11.2:

> "It is required to prove the costs are part of the costs of completing and do not arise from some additional work instructed after termination or other betterment. In this regard, and without prejudice to the generality of the foregoing, M&W understands that EWH has varied its fuel supply agreements so the specification for RDF is now more relaxed. In such circumstances it is highly likely that EWH has had to instruct changes to the plant to enable it to process a wider specification of waste."

41. That is put in that rather negative fashion.

42. The actual way in which the issues were defined for the purpose of disclosure is this. First of all, I am dealing with liability. Let me go to the beginning where it says that these are the proposals for disclosure in relation to the key issues. I then need to go to issue 8A which says this:

> "The availability of compliant RDF for the first defendant to carry out sustained hot commissioning during the period between 9 November 2018 and 4 March 2019."

43. That is because that was a sub-issue in relation to liability and disclosure has been agreed on that basis and has indeed been given on that basis.

44. One then comes to 48. This was one of the defects claims. The allegation was, M&W, had they provided a system that prevented build-up of RDF and provided even gasification and temperature across the bed in relation to the contract. This is what has been called defect 17, or item 17. It is one of the five. Then there is a number of different sub-issues there all to do with the feeding mechanism.

45. For example, on issue 48 the different models are identified and agreed between the parties. The same is done for the position in relation to quantum. The broad agreement between the parties was that it would be model B disclosure for all quantum and model D disclosure for liability.

46. At page 1551 item 8A is the parties referring to the availability of compliant RDF for that period up until 2019.

47. Then there is the agreed mode of disclosure by reference to search terms. So, for example, in relation to item 48, which is the item 17 defect, there is a whole series of search terms which are agreed between the parties. What is said about this is that it is from 1 June 2018 which would go into 2019.

48. The point is not so much that this is an indication that the parties had agreed that generally speaking all RDF disclosure in general form was agreed to be provided for 2019 or 2020. It is that in relation to that particular issue and those particular search

terms there was to be disclosure, which, in my judgment, is a much more nuanced matter and quite a different one.

49. Those were the agreement that were made. Then, as I say, disclosure was delayed about six weeks because of M&W. Once that disclosure process had happened there was no immediate suggestion that EWH had in some way failed in relation to those very carefully drafted disclosure obligations.

50. What happened after that, and I have foreshadowed this, was that there were a series of consent orders. As is well known, the court is not simply going to approve a consent order with new directions unless it is satisfied by assurances given by the parties that this is not going to upset the trial date. Accordingly, the extension of time for disclosure, which was made by consent, was given on 2 December. It is said that it was a new timetable that preserved the current dates for the pre-trial review and the trial. Then on 9 February there was a consent order pushing back witness statements and expert reports with the same wording. Then finally, just four days before this application to adjourn was made on 19 March, on 15 March the parties agreed a new timetable that preserves the current date for the pre-trial review and the trial.

51. Mr Moran is right. The fact of that agreement being made does not constitute some legal bar to making an adjournment application days afterwards but it is a pretty strange state of affairs, in my judgment, because I am entitled to assume that when that consent order was made, involving three very experienced firms of solicitors, they genuinely did take the view that the trial date could be preserved because otherwise they would be acting disingenuously.

52. Also in December it is right to point out that M&W again canvassed the prospect of adjourning the trial. In a letter of 18 November it said it was its primary and preferred position but that if that was not going to be agreed then M&W would have to further accelerate its review process. That is exactly presumably what it did because the directions were approved. There was no application to the court made by M&W at that stage or indeed at any stage before 19 March.

53. Mr Moran took me to that letter to show me that there was, as it were, a vein of concern about the trial date. I am afraid that point does not go very far. You either decide to make an issue of it and apply to the court if you think there is a real problem or you do not. On 25 February it did not say as such that the trial length was wrong or it could not be done. It simply said "the remainder of the timetable remains fraught with difficulties". That may be so, but in fact all of those difficulties had been surmounted because the remaining procedural steps have occurred, apart from a few where it is not suggested that they cannot happen when they are meant to next week.

54. It goes on to say:

> "It is not clear to MW the existing timetable would afford the parties sufficient opportunity to consider all the evidence, nor is it in the interests of justice they are constrained by timetables that are practically unachievable."

55. If that was a really their position then I am afraid I simply do not understand why they were agreeing to that order, or, more importantly, the order on 15 March. The letter of 1 March, while it makes some points about the timetable, does not really take the matter any further so far as moving the trial is concerned.

56. There is a general point here because Mr Moran said that M&W should not be criticised for not seeking an adjournment on an earlier occasion because after all it had been refused back in July and no doubt if it had made an application in December it would have been rebuffed on the basis that it was very premature.

57. I do not accept that at all. I do not accept the argument that M&W for some reason was caught between a rock and a hard place. That is simply not the case. It had caused the delays towards the end of 2020. It was perfectly well aware of what the implications were.

58. The difference between applying in December and the applying now is precisely that if it is left to what Mr Moran accepts is the 11th hour, the party can then say "and after all we have only got two months left to prepare for trial and it is not enough", whereas if

the adjournment application had been brought early that argument would not be available to it. But that is no reason to say it should not have made the application to adjourn. It is all the more reason why it should have done especially since its arguments for an adjournment had been rebuffed by the parties. M&W has got to live with the approach it has taken towards the preparation of this litigation.

59. That is all I need to say so far as the procedural history is concerned. Before I delve into the analysis of the adjournment application itself, I should, of course, rehearse the relevant principles. There is no dispute between them. All the parties have referred to the well-known decision of Coulson J, as he then was, in *Fitzroy v Mentmore Towers*. The relevant factors when considering an 11th hour adjournment application are the parties conduct and the reason for the delays, the extent to which the consequences of the delays can be overcome before the trial, the extent to which a fair trial may have been jeopardised by the delays, specific matters affecting the trial such as the illness of the critical witness and the like and the consequences of an adjournment for the claimant, the defendant and the court.

60. Let me try and deal with this in two ways. First of all, let me deal with the question of disclosure which has now loomed large in the adjournment application. I can understand why because if all that is being said is maybe we should have appreciated it earlier on but it is now very, very clear that there is not enough time in the trial, all of those implications in my judgment, bar disclosure implications, were perfectly obvious to M&W. If the real concern was the length of trial, the first thing you do is what I try to do, as it were, of my own motion, which is you find out whether you have got any longer for the trial. That is the first thing that can be done. That does not involve a full-blown application necessarily. It involves co-operating with the other side and then approaching the court. The longer you leave that, the less likelihood there is going to be for room for manoeuvre.

61. The only other point that can be made by Mr Moran about how things have suddenly changed is in relation to the number of witnesses but I do not think that goes very far, because although the amount of time for cross-examining the main factual witnesses is pretty short, it has to be borne in mind that for much of this case it is going to turn on expert evidence. To the extent that there are witness statements which were put in on

issues like delay or defects, where the experts, who are the real providers of evidence in this area, are agreed, it renders some of that witness evidence redundant.

62. I agree with Mr Moran that if this trial were not to be adjourned then since that is a point made by EWH it should indicate the extent to which it no longer needs to rely on the witness evidence which has been served, but otherwise nothing really has changed. If it is because of late instruction of the expert that is not something that can be laid at the door of the other parties. M&W, I am afraid, has only got itself to blame.

63. I need, therefore, to feed in the disclosure element which is relevant to both strands of the argument. That is to say, the trial length is too short and, in any event, there should be an adjournment.

64. The application to adjourn was made on 19 March. The application for specific disclosure, which is not before me today, was only made on 31 March. I am simply not in a position to second guess that application.

65. It is said by Mr Moran that this is not simply a matter of, as it were, like to have documents which belatedly M&W now want to get, in which case it makes the application at its own risk given the impending trial. What he says, in effect, is there have been significant failings in the disclosure which has already been given.

66. One of the points that is made here, and a critical one according to M&W, is this notion that there is the RDF component in relation to the costs of completion claim.

67. The difficulty about that is that this is model B disclosure. All of this was agreed with relevant search terms at the time. Insofar as there were key word searches going beyond 2018, those documents have been provided.

68. Model B is essentially about documents on which you rely. It is, of course, perfectly true that paragraph 3.12 of the Practice Direction makes plain that there is still the ongoing disclosure obligation to provide documents which are known to be adverse: not through a particular search to be discovered to be adverse but known to be adverse. But really Mr Moran's submission were, and had to be, that it must be the case that

there are adverse documents which are known to be adverse either because of something which has already been disclosed on the existing disclosure so far as RDF is concerned or in relation to the financial claim because there are certain documents that one would have expected to see as supporting documents which are not there, like interest calculations, and the result of that must be that the reason why they have not been disclosed is because they are adverse.

69. I am afraid I am not prepared to accept that argument at this stage. I cannot see any basis for saying that there have been known adverse documents for EWH which they have chosen not to disclose. It seems to me, without going into any great detail about it, that the RDF issue, so far as costs of completion are concerned, is more confined than Mr Moran has said. It is perfectly true it is raised in a somewhat negative way in annexe 4 and there is the odd scattered reference to it in a particular fashion but there is no broad positive plea about the role of RDF in a way which means that there has been a failure to provide disclosure at this stage. If there was going to be some overarching point about the role of RDF, and M&W have got experts who have already dealt with the question of RDF in the discrete areas where it is relevant, it would probably have to make an application to amend. That is not the before me at the moment.

70. I do not consider, having listened to all of the arguments, that there has been some generalised failure to comply with the disclosure obligations that were accepted by all the parties in relation to those matters.

71. Mr Moran relies on some more specific matters as well. For example, there is the question of the DCS, the performance data, which exists in data form and then is accessed by reference to some particular hardware and software. Mr Moran says that in fact because EWH owns the licensed copy of the software and has been running the project it has been able to look at that data insofar as some of the witness evidence is concerned, or at least one paragraph of a witness's evidence. What he then suggests is that EWH has been deliberately obstructive in affording access to M&W in relation to the same data.

72. Having regard to all of the evidence that has been filed, which I will summarise in a moment, I do not think that there is anything real in that point. This is proprietary

software and it appears that M&W first went off to the creator of the software to obtain a licence for £65,000 and they wanted that split with the claimant and there was no agreement about that. It went away again and then came back later and complained about that.

73. I do not really think that that can be laid at the door of EWH. It is entitled to say this is licensed software that cannot simply be given to anyone. Secondly, it has raised security concerns so far as access to the system is concerned. Mr Moran says it is only historical data. Ms Gidwani says that there are sophisticated versions of Excel which will allow the raw data to be interrogated in a way which will be perfectly satisfactory for matters going forwards. EWH has tried to help M&W in this regard.

74. What I am quite clear about is I cannot possibly find on the evidence that has been put before me, as Mr Moran suggested, that this was actually a deliberate tactic that was knowingly adopted by EWH at the beginning so as to give it some kind of time advantage and that it deliberately obstructed any access to the data by M&W. That is a pretty serious allegation. I see no real basis for it. There is nothing in that sort of point in my judgment.

75. There were similar points made, for example, in relation to supplemental disclosure. All parties did that on the supplemental witness statements. There was arguments about whether EWH had supplied as swiftly as it should have done the documents on the load file and FTP, but having regard to the evidence, and in particular Ms Gidwani's two witness statements, I do not think there is any question of any breach there or any deliberate obstructiveness.

76. There was the other database which had been obtained from M and V, who are the new contractors, and there was a debate about which was the correct format. That has all been supplied.

77. I should add that there has then been an issue about whether the generalised sampling data for RDF for the years 2019 and 2020 should be provided. I understand that it now has. It was one of M&W's experts who said that he wanted all of this. He appears to have gone through the 2019 data. However, the key point for me is the supply of that

general data for 2019 and 2020 is simply not within the disclosure review document. It is much more focused than that. On the face of it, EWH could have taken a point on it but once it was asked it has done its best to try and provide that information.

78. Therefore, to the extent that there is disclosure which M&W now wants to have, that will be the subject of the specific disclosure application, but in general terms I cannot see that this is a result of a failing on the part of EWH and it certainly cannot be the reason for an adjournment.

79. Of course, if M&W was ready to act to progress the clam and the defence in the way that the other parties were towards the end of last year, then all of this disclosure and all of the points arising from and the witness statements would all have happened six weeks earlier. I am afraid six weeks is rather a long time in litigation. That is something which, again, cannot be laid at the door of EWH.

80. Let me deal with some other points here between the parties. As I have said, and I hope is clear, the truth is that when one puts specific disclosure to one side the actual issues have reduced rather than increased.

81. Much of the point that has been made about the finance costs claim is really on the basis that it is inadequate. Now, of course, if there were proper disclosure obligations which have not been fulfilled it is not an excuse to say the claim is going to fail, but in the absence of that the sort of points Mr Moran made, which was it was a very strange claim and so on and so forth, then that will inure to the benefit of M&W if it is not properly documented for those purposes.

82. I should have said this earlier on but I need to make it clear for the record. That the witness statements that I had before me were the fifth, seventh and ninth witness statements of Mr O'Brien for M&W: 19 and 30 March and 7 April. The two witness statements for the claimant from Ms Gidwani, 29 March and 6 April. Mr Harbidge 29 March for Outotec.

83. That, in my judgment, says sufficient about the state of play for me now to analyse the application for the adjournment on the two bases that have been put forward.

84. The first basis is, as I say, that the trial is not long enough. In modern day litigation parties have to be selective about what they choose to challenge and what they choose not to challenge. If a party has maintained the position for nine months or so, having regard to all the issues and witnesses, even if some of the witness evidence has increased, it must be taken to have accepted that it can cut its cloth accordingly so far as the trial is concerned. There is not an unlimited right to cross-examine witnesses or to deal with every point.

85. Insofar as the argument is that once one considers the further disclosure that might be obtained that might require further time, that is not before me and I am not going to make any judgments about it.

86. All of that said, while at the moment I am not persuaded that this trial cannot fairly be achieved in the time that is available, it makes sense to provide for some extra time if in fact that time can be found. As a result of enquiries that I have made of listing, and I have presaged this before the parties, the trial would end on 7 July. That would leave 8 and 9 July if 9 July was not used as it normally would be for other applications. The week commencing 12 July and the week commencing 19 July would also be available.

87. In theory all counsel are available, except that Mr Moran says that he wants the week of 12 July to prepare for a two-day hearing, which I think is due to take place on 21 and 22 July, and then he has a four-day hearing in the following week. I think, to be fair to him, he did not emphasise that particularly strongly.

88. If the judge were to order that a trial is to be extended then that is a perfectly good reason for counsel to say they were no longer available for a hearing, particularly one that is only two days in length. I have no doubt at all that if that extended period were to be used Mr Moran would make himself available

89. Six days is the difference between the parties' estimate of how long this trial makes. So far as trial length is concerned, if that was the only issue that was before me then I would simply order that the trial length would be increased to include the week commencing 12 July and the week commencing 19 July for the parties to sort out

between themselves how they might wish to use that period. Those weeks would be made available.

90. The judge, whoever it is, would be allocated those two weeks for the trial and then there would still be the week commencing 26 July which might or might not be used for closing submissions. I am not saying that all of those two weeks would be used. All I am saying is that what I can do at this stage is to make them available. If this trial was to stay in the list that would be something which could be dealt with hopefully with the trial judge on 23 April. So trial length is not a problem in my judgment.

91. The other strand which is emphasised by Mr Moran is that even if it was, it is not possible now to prepare for the trial even of the correct length. Everyone has worked to tight timetables. All the steps have been complied with. I have to say that if, for example, in order to be fully ready for this trial M&W finds that it needs to increase its resources, whether by way of extra solicitors or more junior counsel than the two who are already engaged in this case, it is going to have to throw those resources at it. It has been the victim of its own resource limitations in the past. If it has to spend more money on lawyers to deal with this, that is what it can and should do.

92. For example, all the sorts of points that Mr Moran was making about the fragility, if I can put it in that way, of the financing claim for £50 million is precisely the sort of thing that junior counsel could deal with in the background where other counsel are dealing with different matters and where Mr Moran is concentrating on the key points that he wishes to run at trial. None of that is impossible.

93. That is a general point so far as preparation is concerned.

94. Whether further disclosure is ordered and whether that can be taken on board is a matter for the specific disclosure application but it cannot really be said now to be a reason why this trial cannot be got ready in time. A number of the disclosure points could have been made, in my judgment clearly could have been made, last year by the subject of a disclosure application. Not only was a disclosure application not made, the directions were agreed by consent in the meantime.

95. So far as cross-examination of factual witnesses is concerned, I take Mr Moran's points. There are some very long witness statements here but I do not think that in the two months before the trial it is not possible for cross-examination of those witnesses to be got up, especially since the witness statements have now been served for some time. So far as the experts are concerned, it would appear that the more they talk, the more they agree and the less there are real issues between the parties. So in that respect things have shrunk. In my judgment there is nothing so far as the expert evidence is concerned which is going to prevent proper preparation of the trial.

96. Next, trial bundle. It does appear as if this has been running late. I agree with Mr Moran that it really should have been agreed by the time of the pre-trial review on 23 April. It looks like it is going to miss that deadline at least so far as a complete agreement on a hearing bundle is concerned. But having heard from Mr Denison about that, it seems that quite a lot of it has been done. The real question is the chronological bundle now for 2019: 2018 being the key point at least where liability and quantum are involved and from March 2019 quantum only going forwards.

97. It is going to be tight no doubt, but I do not see that this trial cannot be prepared on time. I notice that M&W want to amend their pleading. I do not know how extensive that is but that is not really something that I can take into account in favour of M&W. I have not even seen it. I made it perfectly plain to Mr Denison that if there was going to be some application, which he said there would not be, to amend, other than simply to bring in the actual costs to completion, then that is going to have to be justified. But I do not see any point in trying to speculate on what might come further down the line.

98. Just picking up some other points. Again going back to disclosure, and I apologise for going out of order here, but going back to the finance claims or the cost of completion claims, Mr Moran makes points like it is surprising that there not the bank statements, it is surprising there were not budge assumptions and all the rest of it. Those are matters that could have been raised quite some time ago and certainly before the end of last year. As I say, there is difference between getting on and making those sorts of disclosure requests in December and now in April because there is something over three months which has been allowed to elapse in the meantime.

99. Mr Moran made a point about the parties are not on an equal footing for trial. I disagree. If M&W need to throw more resources at this case because they have not done that enough in the past, that is a matter for it. If it needs to spend more money on the case, that is a matter for it. Mr Moran's equal footing point was based on this idea that there was some deliberate tactic on the part of EWH. I just do not accept that.

100. Just picking up on one or two other points. One of the points that I need to deal with of course is the question of prejudice. The prejudice works in two ways: the prejudice caused by having an adjournment to those who do not want it and the prejudice caused by not having the adjournment to the party that wants it.

101. The prejudice to M&W by not having the adjournment is essentially that it says it cannot have a fair trial either because the trial is not long enough, and I have dealt with that, or, secondly, because it is not going to be in a position properly to discharge its case at trial.

102. I reject that for the reasons which I have explained. In my judgment, this case can be got up. Notwithstanding what Mr Moran has said about the multitude of issues, in my judgment the liability points are pretty limited and are largely going to be matters of contractual analysis in my judgment.

103. I appreciate that there has been a point about wilful default which has now been introduced but I doubt that that is going to take very much more time so far as evidence is concerned. Anyway, it was an amendment which was agreed as has been the case in all of the other amendments.

104. Converse to that is the position of the parties who do not want the adjournment if it were to happen. I have already explained the particular concern about recovery on the finance charges which will increase by another year. I have dealt with that. There is the general point about the increase in the costs which is inevitable if there is to be an adjournment. In a case of this size they will be very significant in my view. So far as witnesses who may not attend this year or might attend this year, there is always the possibility of that. The longer a witness is away from the project concerned, and here it is back in 2018 and 2019, there is at least the chance that some of them will not be

available but there is no evidence before me that most if not all of the experts will not actually be able to appear but there is undoubtedly going to be costs here.

105. Outotec, for its part, says that it does not have a liability to M&W but M&W has a liability to it. It would like to be paid for the work that it did back in 2018. The same applies, of course, to EWH generally as far its financial claims are concerned.

106. Undoubtedly it is all very well saying that the experts and all those reports will, as it were, be there and then they will all be picked up again in April or May next year. It is never as simple as that. They are always extra costs when you have to adjourn a trial especially for this length of time.

107. However, there is another important aspect of this. I have reached the very clear view having heard all of counsel and having seen all of the procedural steps that have now been complied with, that these experts are essentially ready to go and they have worked extremely hard. They have got the facts of this case very much at the forefront of their minds and I think it will be absolutely disaster if the whole thing was to go away for a year. I also have no doubt that although Mr Moran has raised what may be pertinent questions and pertinent criticisms of EWH's case, that he is pretty up to speed on this. I think all counsel are up to speed on it. It is not a disaster scenario as has been painted.

108. That is a huge prejudice in my judgment in fact to all parties if this matter goes off because this is not a case where, as sometimes happens two months before the trial, there are really important procedural steps which have not even been undertaken, like the service of witness statements or the service of experts reports. M&W really had a choice here. It really had to go along with a tight timetable after the extensions which it had sought and buy into this trial, I am afraid to say, or it had to make a major application to adjourn it and not go along with all of these orders. It has taken the former course which I happen to think is not actually unrealistic.

109. In the light of all of that I therefore return to the relevant factors as laid out by Coulson J. The first factor is the parties conduct and the reason for the delays. Any delay in my judgment in the way things have panned out is overall to be put at the door of M&W

and not at the door of EWH whatever particular points may have been made about this form of disclosure or that form of disclosure.

110. Secondly, the extent to which the consequences of the delays can be overcome before the trial. On the basis of what is before me now, which does not include specific disclosure, the consequences of the delays have largely been sorted by the parties because all of the procedural steps, bar a few, have actually been done, all the materials are there and counsel can get on to prepare for it.

111. The extent to which a fair trial may have been jeopardised by the delays. I do not think that the fair trial has been jeopardised by the tight timetable that the parties have adopted because it has been complied with. There are no specific matters affecting the trial, such as illness of a critical witness and the like.

112. The consequences of an adjournment for the claimant, the defendant and the court I have already dealt with.

113. A further point was made which was to the effect what is the significance of disclosure issues now raised before the trial. Coulson J, as he then was, had something to say about that in the *Elliott Group v GECC UK* paragraph 17: a delay of disclosure of six weeks would that delay cause prejudice: he said there was no real evidence that it would. He said, "There is a tendency automatically to equate delay with prejudice." He did not accept that equation and neither do I. He said:

> "There could only be prejudice if the late disclosure revealed a whole series of critical documents, which had been never seen before, and which will have a major impact both on the allegations in the case and on the time necessary for preparation of the witness statements. That seems to me to be the sort of analysis which might give rise to a finding of potential prejudice ..."

114. That is very different from the circumstances in this case, particularly as, as Coulson J went on to say in paragraph 20, for the most part it is going to be a matter of expert evidence.

115. For all of those reasons, stated at rather greater length than I had hoped, there is clearly no basis for an adjournment of the trial as a whole. That leaves Mr Moran's fall-back position, which is that there should be at the very least a split trial with some or all of the quantum issues put over.

116. That might have been attractive if it was the only alternative to adjournment but it is not in my view. In my view, the offer of up to two more weeks of trial time, if it was even necessary, means that that alternative is completely redundant in my view and in fact, in my judgment, although the money claimed here is very large, it does not alter the fact that all of this can be done within the trial timetable. Of course, one of the problems with quantum going off is that it means, whichever party wins, there is going to be no money payment here until the end of the quantum issues. For example, Outotec's position was that you can adjourn the quantum but not their bits of quantum. However, once you start to salami slice like that, none of that makes much sense. Although it is hardly determinative I do agree with Mr Williamson, that a trial can concentrate the minds. Of course, if you were only keeping a trial to concentrate the minds and the trial itself would be unfair, that is no basis for keeping the trial but it does not arise here.

117. For those reasons, I refuse the adjournment and I refuse a split trial.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge