Case No: JR 1401424

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice, Strand
London, WC2A 2LL

Date: 30/05/2014

Before :

MASTER ROWLEY, COSTS JUDGE

Between:

Rachael Wood and Julian Pipe (Executors of the Estate of David Pipe, Deceased)

Claimant

- and -

Electrothermal Engineering Limited

Defendant

- -
- -

Mr T Asquith (instructed by **Irwin Mitchell**) for the **Claimant**
Mr S Gibbs (instructed by **Plexus Law**) for the **Defendant**

Hearing date: **8 May 2014**
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER ROWLEY, COSTS JUDGE

Master Rowley:

Introduction

1. The parties came before me on 8 May 2014 in respect of the Defendant's application to prevent the use of the Claimant's replies to the Defendant's points of dispute in these proceedings. The Defendant says that the replies were served late and in any event are defective. The Claimant disputes both charges but has issued an application to seek relief from any sanction imposed if I am against the Claimant on the Defendant's application. In view of the protective nature of the Claimant's application, and the time constraints at the hearing, the parties did not address me specifically on that application. It has been held in abeyance pending this judgment on the Defendant's application.

2. The underlying case involved a personal injury claim by the Claimant relating to his exposure to asbestos whilst employed by the Defendant. The Claimant died during the course of the proceedings but the claim was ultimately successful and the Claimant's representatives agreed terms with the Defendant in May 2013 with the consent order being sealed in June 2013.

3. The chronology of the Detailed Assessment proceedings to date is as follows:-

   11 October 2013 – Notice of commencement and bill of costs

   1 November – Points of dispute served with an open offer in accordance with PD47 paragraph 8.3.

   28 November – Email from Defendant to Claimant seeking response to the offer.

   29 November – Email from Claimant to Defendant making without prejudice counter offer and providing bullet point "Response to issues raised in PODS".

   2 December – Email from Defendant to Claimant indicating that the parties' offers were "some way apart." It concluded with the words "In the circumstances it may be sensible for you to serve points in reply."

   18 December – Replies to points of dispute served.

   2 January 2014 – Letter from Defendant to Claimant acknowledging service of the replies. It proposed that the case was set down for assessment given the parties' positions.

   14 January – Without prejudice letter from Defendant to Claimant indicating the replies had been served out of time and the Defendant did not consent to late service. The letter also alleged that the replies did not comply with the rules.

   23 January – Without prejudice letter from Claimant to Defendant disputing the claim that the replies had been served out of time. There is no comment made about the form of the replies.

3 February – Letter from Defendant to Claimant objecting to the use of the Replies in the provisional assessment bundle.

The provisions of the Civil Procedure Rules

4. The required format of points of dispute are set out in paragraph 8.2 of the Practice Direction to Part 47 as follows:

> ***8.2*** *Points of dispute must be short and to the point. They must follow Precedent G in the Schedule of Costs Precedents annexed to this Practice Direction, so far as practicable. They must:*
>
> *(a) identify any general points or matters of principle which require decision before the individual items in the bill are addressed; and*
>
> *(b) identify specific points, stating concisely the nature and grounds of dispute.*
>
> *Once a point has been made it should not be repeated but the item numbers where the point arises should be inserted in the left hand box as shown in Precedent G.*

5. The time for serving a reply is set out at CPR rule 47.13:-

> ***Optional Reply***
>
> ***47.13***
>
> *(1) Where any party to the detailed assessment proceedings serves points of dispute, the receiving party may serve a reply on the other parties to the assessment proceedings.*
>
> *(2) The receiving party may do so within 21 days after being served with the points of dispute to which the reply relates.*

6. The format requirements of a reply are set out in paragraph 12.1 of the Practice Direction to Part 47:

> ***Optional reply: rule 47.13***
>
> ***12.1*** *A reply served by the receiving party under Rule 47.13 must be limited to points of principle and concessions only. It must not contain general denials, specific denials or standard form responses.*
>
> ***12.2*** *Whenever practicable, the reply must be set out in the form of Precedent G.*

7. Precedent G is one of the documents in the Costs Precedents which are to be found at the end of the Practice Direction to Part 47. The relevant part of Precedent G is as follows:-

Point 1 General Point	Rates claimed for the assistant solicitor and other fee earners are excessive. Reduce to £158 and £116 respectively plus VAT.
Receiving Party's Reply:	
Costs Officer's Decision:	
Point 2 Point of principle	The claimant was at the time a child/protected person/insolvent and did not have the capacity to authorise the solicitors to bring these proceedings.
Receiving Party's Reply:	
Costs Officer's Decision:	
Point 3 (6), (12), (17), (23), (29), (32)	(i) The number of conferences with counsel is excessive and should be reduced to 3 in total (9 hours). (ii) There is no need for two fee earners to attend each conference. Limit to one assistant solicitor in each case.
Receiving Party's Reply:	
Costs Officer's Decision:	

The parties' submissions on timing

8. As can be seen from paragraphs 5 and 6 above, the use of a Reply is optional according to the headings to the rules. Mr Gibbs, for the Defendant, accepted this was the case, but was clear that if the receiving party did decide to produce a reply, it had to be served within the 21 days provided by CPR 47.13. If it was not, then the receiving party needed to seek permission to rely upon the document. The Claimant had not done that; at least not until the eve of this hearing when the protective application had been made. The fact that the reply was optional did not make any difference to the need to comply with the time limit imposed by the rules if a reply was indeed to be served.

9. Mr Gibbs also accepted that there was no specific sanction if a reply was not served in time and as such was unlike, for example, CPR 32.10 regarding the

use of witness statements. Nevertheless, the time limit was there for a reason and if it was not complied with, the defaulting party needed to make an application to the court.

10. Such an application would require an explanation of why the replies were served late. In the protective application, the suggestion is made that the reason was to facilitate negotiations. Mr Gibbs pointed out that there was no communication whatsoever between the parties until after the due date for replies (26 November) had passed: the Defendant's open offer having been seemingly ignored in the meantime.

11. The Defendant's letters of 2 December 2013 and 2 January 2014 regarding service of replies and setting down for a hearing respectively, were not, according to Mr Gibbs, to be seen as any consent to the delay. There was certainly no express agreement and as such the Claimant ought to have made an application for relief.

12. Mr Asquith, for the Claimant, relied upon the parties' correspondence to demonstrate their agreement to deal with the initial procedural aspects of the proceedings in what he categorised as being a sensible way. Replies were requested when the parties' offers had not proved acceptable. Thereafter, the seeking of a provisional assessment was suggested when the replies had not narrowed the issues sufficiently for the parties to resolve their differences. Mr Asquith made reference to the decision of Males J in Rattan v UBS AG [2014] EWHC 665 (Comm) regarding parties' correspondence which agreed a date for the exchange of costs budgets only 6 days before the Case Management Conference. One party then served their budget a day earlier and took the point that its opponent was outside the time limit set by CPR 3.13. Males J described the submissions as "manifest nonsense" and the application as the sort of "futile and time wasting procedural point" that should not be taken.

13. Mr Asquith drew comfort from the judge's comments both on the agreement and on the merits of the resulting application. Here, the Defendant knew the Claimant was outside the time for serving Replies when it invited the Claimant to do so. Subsequently arguing that they were served out of time was something that Mr Asquith submitted I should determine the Defendant was estopped from doing; or that the Defendant had waived its ability to take the point in the first place. Alternatively, I could find that there had been a contractual agreement regarding the service of the Replies. Or even, that as a matter of procedural fairness, I should allow the Replies in under the overriding objective.

14. The last of these three approaches was based on the Claimant's position that the replies were not late in any meaningful sense anyway. Mr Asquith relied on textbook commentary which suggested that the "sanction" for late service of replies would normally be costs consequences if the paying party was prejudiced in his preparation for the hearing and there had to be an adjournment or similar. The use of replies served after 21 days caused no other prejudice to the paying party and so were routinely allowed. The time limit of 21 days was simply a signal to the court of the point at which the paying party might be able to demonstrate prejudice in a particular case.

15. Mr Asquith drew the contrast with the provision in the Practice Direction to Part 47 (paragraph 13.10) which allows for the revision of points of dispute and replies without permission of the court (albeit that the court can disallow them if it considers it appropriate). It would be surprising, to put it mildly, in Mr Asquith's submission, if a one page reply could be served within the time limit and then "revised" into a fifty page document thereafter without difficulty – but a first version of the reply would not be allowed in if served later than 21 days.

16. Mr Asquith reminded me that, in the absence of a sanction, the time limit specified by CPR 47.13 could be varied by the parties in accordance with CPR 2.11 and was not caught by CPR 3.8. The parties' correspondence had impliedly agreed a variation to the original time limit in his submission.

17. In response to Mr Gibbs' argument that there was no sanction imposed by CPR 47.13 because it was an optional provision, Mr Asquith suggested that it would have been very easy for the rule committee to have included wording to the effect that if replies were served, then they had to be served within 21 days, failing which some sanction would apply, but they had not done so.

Decision regarding timing

18. This application is a good example of matters being brought before the courts on a daily basis. One party has not complied with a rule, practice direction or order. The other party wishes the court to enforce compliance as is required by the overriding objective and, where an application for relief is made, based on the recast CPR 3.9.

19. There is no specific prejudice to either party here. If the Replies are disallowed, the provisional assessment will go ahead without them being used and it may be that a lesser sum is allowed on assessment than would have been the case if the explanations in the replies had been available to the court. Even if that is so (and it may be that papers otherwise lodged with the court would provide the same information anyway) the Claimant could still seek an oral hearing which is essentially the same as a traditional detailed assessment hearing.

20. If the replies are allowed to remain in the court file, for the reasons described in the second part of this judgment, the court may be no better informed than if the replies had not been drafted.

21. There is no impact on the court system here either. The papers, including the replies, arrived for the provisional assessment and would, absent this application, simply have been allocated to the appropriate judge to deal with.

22. It is only if the replies had been served after the request for a detailed assessment had been lodged with the court, that there would be extra work caused to the court in marrying up the replies with the rest of the papers. Given that there is no mechanism for the paying party to respond to replies, whenever served, it is at least arguable that the change to provisional assessments does not cause there to be any change in the procedure regarding late replies following the revision of the costs rules in April 2013. It

is also arguable that the paying party is, in some ways, better off. On a detailed assessment hearing, the paying party would have to react to the points made in late-served replies. Now, provisional assessments mean that the paying party has the opportunity of seeing how the paper assessment goes before deciding upon whether to seek an oral hearing and to deal with the points raised in the replies at that juncture.

23. In the absence of any prejudice to either party, and no discernible effect on the administration of justice, applications such as this one leave the court with the apparently stark choice of either enforcing compliance "for the sake of discipline" or not doing so and allowing parties to be "indulged" in ways said to be no longer appropriate.

24. I indicated to the parties during the course of submissions that, absent the provisional assessment issue, I had thought applications to strike out late served replies were generally futile. Even if successful, there would be nothing to prevent a receiving party reading out the contents of the replies as part of his oral submissions at the subsequent detailed assessment hearing.

25. Having reflected on the change imposed by the provisional assessment procedure, I remain of the view that there is no purpose in an application which seeks to strike out the replies for being served outside the specified time limit.

26. As discussed above, the contents of the replies may be gleaned from other papers lodged with the court in any event. Even if not, there is a second chance for the receiving party to put arguments forward at a post-provisional oral hearing. The costs provisions of such hearings mean that only sizeable points are going to be worth taking. But they are likely to be the "points of principle" which are meant to be addressed by the replies anyway.

27. It does not seem to me that the overriding objective is going to be well served by requiring parties essentially to serve replies within 21 days or not at all. The likely outcome, in my view, would be that holding replies would be served in the manner described by Mr Asquith and which would be revised as appropriate nearer to a hearing. Since it is the receiving party who requests the hearing, the revised replies might well be included with the documents lodged with the court and which would give the paying party rather less time to respond to them than if they were served earlier, albeit outside the 21 day time limit.

28. These comments should not be taken as carte blanche for receiving parties to serve replies with little or no regard for the rules. Parties should agree extensions where extensions are required. If they cannot agree an extension, an application to the court should be made.

29. The application of costs consequences for late service is much more likely to apply than was formerly the case. The only way to be sure to avoid such consequences is, as the Court of Appeal said in Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ 506, *"for parties to comply precisely with rules, practice directions and orders: and, where that really is not capable*

of being done, to seek from the court the necessary extension of time and relief from sanction at the earliest moment."

30. The detailed assessment procedure is designed to avoid the parties involving the court unless and until a hearing is required. The assumption is that the parties will generally be able to negotiate an agreed sum based on the costs order made (or deemed to have been made) by the court. The hope is that this will not require the receiving party to expend too much further time and expense in establishing the extent of his entitlement to costs.

31. Accordingly, there is no sanction for the delay in commencing detailed assessment proceedings, other than interest, unless the paying party makes a specific application. Similarly, the receiving party only has to serve replies if he thinks there is a benefit to doing so. Usually this will be to explain something which was not clear from the bill and has been raised in the points of dispute.

32. Conversely, there are strict rules for the paying party regarding points of dispute. He is the one likely to prevaricate in the quantification of his opponent's costs so he is given little latitude in completing his part of the procedure.

33. Given the variation in approach between the procedural obligations of the parties, it seems out of step to impose effectively a sanction on the service of replies which are meant to be helpful in explaining or narrowing the issues.

34. To sum up, there is no discernible prejudice to the parties; and no inconvenience to the court or to other court users. A rigid enforcement of the time limits runs counter to the underlying approach to receiving parties in detailed assessments. If successful, such applications prevent the court from utilising a helpful document or simply result in the court receiving oral versions of the same arguments previously submitted in writing. For these reasons, I refuse the Defendant's application for the provisional assessment to take place without the court having any regard to the Claimant's replies.

35. I turn now to the contents of those replies and whether some or all of them should be struck out for failing to comply with the provisions set out in paragraph 6 above.

<u>The parties' submissions on format of the replies</u>

36. The Defendant's submissions on the form of the Replies depended very largely upon the terminology used in the Practice Direction to Part 47. As can be seen from paragraphs 4 and 6 the Practice Direction requires

    a. points of dispute to be divided into two categories. The first covers *"general points or matters of principle."* The second deals with specific points in the bill.

b. replies are to be limited to *"points of principle and concessions only."* The replies must not contain denials, whether general or specific, or what are described as standard form responses.

37. The extract from Precedent G which I have set out at paragraph 7 gives, as Point 1, an example of a "general point" being hourly rates claimed in a bill. Point 2 is an example of a "point of principle", namely the capacity for the claimant to have given instructions to his solicitor for work to be carried out. Point 3 is an example of a specific challenge to items in the bill. It disputes the number of conferences with counsel and also the number of people attending each conference.

38. Mr Gibbs made the point that replies were only to be made to points of principle, not general points, according to the practice direction. The only appropriate replies to a general, or indeed specific, point would be those which set forth a concession. In relation to general points such as hourly rates, a concession would mean a counter proposal to the paying party's offered rates i.e. rates the receiving party would accept which were lower than those set out in the bill. For specific points, the concession would be a shorter amount of time spent; a smaller number of routine communications; fewer attendances upon counsel or by fewer people etc.

39. Mr Gibbs took me to the replies and said that, of the fifteen points of dispute, only the replies to points 8 (documents) and 15 (interest) made any concessions. There were no points of principle identified in the points of dispute; there was one general point (hourly rates) and the remainder were specific items. Consequently all but the replies to points 8 and 15 did not comply with the requirements of the Practice Direction. As a minimum, the non-compliant thirteen replies should be struck out.

40. Mr Asquith's skeleton argument alleged a lack of particularity in the Defendant's application as to which replies were being challenged by the Defendant. Having heard Mr Gibbs' position amplified at the hearing, Mr Asquith changed tack to emphasise the argument that the replies may set out a point of principle, even if the points of dispute do not describe the item in such terms. In reply, Mr Gibbs made the point that I would have to find a point of principle in each of the thirteen non-compliant replies for Mr Asquith to get this point home.

41. Mr Asquith also addressed me on the utility of replies in fleshing out the information contained in the bill. The bill could not be drawn in a fashion which sought to anticipate all potential challenges since to do so would make the narrative in particular far too long. Instead, the receiving party would deal with the issues raised specifically by the points of dispute by way of reply. That is what has happened here. Whilst a number of the replies do maintain the items claimed in the bill they set out a focused argument on the challenge made and are not the repetitive bare denials which have been barred by the prohibition of standard form responses.

42. The advent of provisional assessments has meant that the only way for a receiving party to get his case across to the court is to provide information in

replies since he can no longer provide an oral explanation to the paying party's challenges. To prevent the receiving party from doing so would, according to Mr Asquith, be to impinge upon his Article 6 rights. Accordingly, any definition of a point of principle should be a broad one and should include a reply which was at least in part a matter of principle.

43. When asked what a paying party should do when faced with replies which do not follow the requirements of the Practice Direction, Mr Asquith boldly argued that he should do nothing, save for in an egregious case. He should rely on the costs officer to ignore the inappropriate replies; make some consequential costs order; or, in an exceptional case, require the receiving party to redraft the replies to make them compliant. Normally, the costs officer would simply ignore them as being irrelevant. Mr Gibbs' response to this submission was that it would simply result in a continuation of pre-Jackson attitudes and practices.

Decision re format

44. Prior to the recasting of the costs rules in April 2013, points of dispute were required to identify each item in the bill which was disputed and to state concisely the nature and grounds of the dispute. These words live on in the Notice of Commencement. In practice the word "concisely" was often overlooked. Moreover, the invariable practice was to divide the challenges between those which affected the whole (or at least a noticeable portion) of the bill from those which were individual in nature. The former challenges were set out at the beginning and the latter challenges were then set out numerically by the order of the items in the bill. Organically, decisions such as Home Office v Lownds had dictated a batting order for the general challenges so that, for example "proportionality" would usually be first, unless there were challenges to the receiving party's retainer. Once the general challenges had been dealt with, the court and the parties would then deal with the "nuts and bolts" of the assessment.

45. The "general challenges" did not comply with identifying an item in the bill as such and various practices were followed. For example, in relation to additional liabilities, some paying parties would challenge them all at the outset; others might challenge the success fee at the outset but only the insurance premium as a specific item later in the bill. Sometimes this would depend on whether there were any notification issues for the premium, which might seemingly make it a general item, even though it still only related to a single entry.

46. The general challenges were called points of principle by some. In the old Precedent G, there was a "general point" relating to hourly rates but otherwise they were all specific items. Courts would regularly group the general challenges together and list a hearing to deal with the "preliminary issues" where the size of the bill justified this approach.

47. The recasting of the rules in April 2013 has not altered the practice of placing general challenges at the beginning of the points of dispute and the specific challenges thereafter. The latter challenges have been grouped together in

accordance with the final paragraph of CPR 8.2 but there has been little alteration to the layout of the general challenges. This in my judgment is in accordance with the intention of the rule makers. The revision to the costs rules was essentially a re-ordering so as to take account of certain new aspects such as the new test on proportionality and the removal of numerous rules such as those relating to recoverable additional liabilities.

48. The old rule did not refer to points of principle at all. It referred to "matters of principle" when referring to points of dispute. Precedent G solely referred to a general point. There was therefore no definition of what a point of principle was, nor what distinguished it from a general point, nor indeed whether either or both could properly be described as preliminary issues.

49. PD47 paragraph 8.2(a) now refers to "general points and matters of principle." In this case, the points of dispute seek to define "points of principle" by quoting part of paragraph 8.2(a) as being matters *"which require decision before the individual items in the bill are addressed"*. This statement is made in the context of seeking to remind the Claimant that replies should only respond to points of principle (not general points) or consist of concessions.

50. It seems to me that this "Note to Claimant" is an unfortunate addition to the points of dispute. It is contentious, to say the least, that the words quoted are a definition of a point of principle as opposed presumably to a general point. Both are usually required to be determined before individual items are addressed. In my judgment it is unconvincing to suggest that paragraph 8.2(a) should be read so that the words general points are divorced from the remainder. It is almost as if there is a deliberate attempt to dissuade the Claimant from serving replies, or at least to limit their scope in respect of general challenges.

51. The Defendant's argument that there is a distinction between a point of principle and a general point is made solely to seek to avoid the Claimant being able to respond to matters such as the claim for hourly rates. This seemed to me to be the weakest argument of the Defendant in relation to the format of the replies. I accept entirely that anticipatory pleading in the bill narrative is to be avoided. Paragraph 5.11 of the Practice Direction to Part 47 is clear as to what is required and there is an emphasis on brevity. In respect of hourly rates, paragraph 5.11(2) requires *"a statement of the status of the legal representatives' employee in respect of whom costs are claimed and (if those costs are calculated on the basis of hourly rates) the hourly rates claimed for each such person".* It certainly does not require wording anticipating arguments as to the location of where the work was done, the degree of responsibility undertaken by the fee earner or any of the other arguments that might be deployed by the paying party.

52. If the Defendant's argument is to be accepted, the court will have a bill with information as set out in the preceding paragraph, together with the paying party's argument about the inappropriateness of the rates claimed but with no response from the receiving party, even if there is a great deal to say. That cannot be right, particularly where the receiving party cannot be heard orally, at least in the first instance because there is a provisional assessment on

paper. It cannot be said that the costs officer is dealing with the case justly and at proportionate cost to require the receiving party to seek an oral hearing post a provisional assessment when that would be avoided by the serving of a reply which included comments on general points.

53. Replies are explanatory and concessive in nature: they are helpful documents to the court. The standard form responses have rightly been banished from replies so that lengthy and unhelpful repetitions of items being "maintained" are no longer to be served. Similarly repetitious points of dispute have been improved by requiring an aggregation of the item numbers relevant to a particular argument where the same point is to be made.

54. It would be completely against this flow if the restrictive interpretation urged on me by the Defendant was to be accepted. Challenges are dealt with in the same way whether they are said to be points of principle or general points. They are all preliminary issues to be dealt with before the individual items. I have alluded to the variation of practice above. I note that in the new Precedent G, one of the specific items challenged is the number of fee earners attending upon counsel. In my experience that point is regularly made as a general point by paying parties who seek a ruling that can be applied across the bill. Almost as regularly, receiving parties argue that each conference needs examining individually to see the reasonableness of the attendance. It seems to me, as Mr Asquith submitted, that there is no reason to think that the parties will necessarily classify any particular point in the same way. For one party it might be an individual item challenged, for the other it might be a general point or a point of principle.

55. These comments lead me to the conclusion that there is no qualitative difference between general points and matters / points of principle, at least in so far as the drafting of points of dispute and replies is concerned. Consequently PD47 paragraphs 8.2 and 12.1 should, in my view, be read as requiring paying parties to group preliminary issues together at the beginning of the points of dispute and the individual issues thereafter. Receiving parties may reply to any of the preliminary issues, regardless of whether the reply contains any concession.

56. The more difficult aspect of the format issue to my mind is the use of replies to maintain individual items. There is a distinct danger, as Mr Gibbs forewarned, that the improvements I referred to in paragraph 53 will be lost if receiving parties start to go back simply to maintaining each and every item, as indeed has happened here.

57. But these replies clearly illustrate the changing nature of points of dispute and replies. There are only fifteen points of dispute for a bill of virtually £60,000. The grouping of items such as attendances upon the client and documents items, especially where there are several parts to a bill, are reducing the number of points raised. Consequently, it is easier for the receiving party to provide focused replies to challenges made, even if the outcome is a maintenance of the items claimed.

58. Furthermore, one of the purposes of points of dispute is to raise questions about items claimed in the bill. This may be because the paying party does not understand why or how certain sums are claimed on the face of the bill; it may be because further information is needed to be able to decide whether to challenge items, for example greater information on the fee notes of counsel or an expert. The point of dispute is therefore interrogatory in nature. It is something of a leap to describe such points as *"stating concisely the nature and grounds of dispute"* as is required, but it is entirely accepted that the paying party is entitled to ask for clarification and information. Similarly, it seems to me, that a receiving party must be able to provide clarification or information in a reply to a point of dispute. It is helpful to the court and, where a provisional assessment is taking place, may save the judge considerable time in locating the same information from the receiving party's file where this has been lodged (or prevent an unjust decision where there are no papers.)

59. It is a matter of fact and degree as to the point to which such replies are helpful. Regurgitating passages from the bill, or, as here highlighting the absence of evidence provided by the paying party to challenge an insurance premium, are not the sort of replies to be encouraged.

60. What should the court do about unhelpful replies? It seems to me that requiring the receiving party to redraft replies is a disproportionate approach to take in most cases. If the reply is unhelpful it will be disregarded by the judge. Should there be costs implications of the paying party having to consider and deal with lengthy and unhelpful replies, then that can be dealt with by the court. Similarly claims for the costs of producing such replies can be dealt with on either provisional or detailed assessments. In this case, I would say that only three of the replies (numbers 4, 13 and14) were unhelpful. I do not think it would be of any benefit formally to strike these three replies out when the practical benefit of doing so is nil. An unhelpful reply will, by definition, remain unhelpful whether it is left in the replies or removed. Its continuing presence will not assist the receiving party nor be to the paying party's detriment.

Conclusion and Next Steps

61. For the reasons I have set out I dismiss the Defendant's application and so do not need to hear the Claimant's application. If the parties are able to agree an order consequent upon this decision there is no need for either party to attend the handing down.

62. I will then transfer this case to another Master who has not seen the without prejudice correspondence. He will inform the parties as to whether he wishes to deal with the matter as a provisional assessment or, bearing in mind some of the points regarding additional liabilities, he may simply wish to have a detailed assessment hearing.