



Technical

Potential Problems With Pursuing Exaggerated Claims in Construction

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This Article concerns the potential problems in Contracting Parties pursuing exaggerated claims

1. We are fairly certain that Contracting Parties are all experiencing the increased commercial pressure imposed upon them in the construction and engineering sectors.
2. Many of the financial pressures are caused by:
 - The general impact and state of the economy.
 - Kamikaze tendering and pricing.
 - Insolvency of one of the Parties.
 - Late payments impacting upon cash flow.
 - Commercial reality of the construction and engineering sectors.
3. In this Article we will outline the principle of 3 cases which involved a Party pursuing exaggerated claims, but with quite different outcomes.

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A Reckless Disregard for Others' Rights or Possible Rights May Land You in Prison

4. A case that dates back to 1997 and a Contract between a Main Contractor (*Allied Building & Construction*) and a Heating Sub-Contractor (*A R Adams*).
5. The Main Contract was for building works at the Mansion House for Cardiff City Council. When a water leak occurred and caused damage, Allied Building issued a bill to A R Adams for its claim in the sum of £15,592.66 plus VAT. Although A R Adams believed the leak was not much to worry about, Allied Building stopped making payments on the basis that £15,592.66 was set-off for remedial works, delays to progress and drying out. A R Adams disputed the set-off but to no avail.
6. A R Adams then contacted Cardiff CID who employed a Quantity Surveying practice to value the works. The Quantity Surveyors valued the works at £437.55 plus VAT. The Managing Director of Allied Building was arrested and imprisoned on 2 counts of attempting to obtain money by deception.

A Successful Claimant Who Pursues an Exaggerated Claim May Still be Expected to Bear the Defendant's Costs

7. This was the situation between *Brit Inns Limited (in Liquidation), Barker and Lawlers ("Brit") -v- BDW Trading Limited and J Reddington Limited ("BDW")* (No. 2) 7 September 2012.

Brief Summary and Key Facts

8. In *Brit Inns Limited and Another ("Brit") v BDW Trading Limited ("BDW")* (No. 2) [2012] EWHC 2489 (TCC), the High Court considered the proper approach to costs in a case where BDW had taken a more realistic view of the value of the claim than Brit, but subsequently failed to protect their position on costs by not making an appropriate Part 36 Offer.

9. Following extensive renovation to a flood-damaged business, Brit brought 2 separate actions:
 - A subrogated claim by insurers.
 - An uninsured claim primarily for loss of rent and loss of profit.
10. They claimed damages of approximately £660,000.00 and £552,000.00 respectively, and were awarded £157,467.00 in the subrogated claim (that is approximately 25% of what they had claimed) and £16,403.00 in the uninsured claim (that is approximately 3% of what they had claimed).
11. During the course of the proceedings both sides made a number of offers to settle, none of which were accepted.
12. In this case, Brit had exaggerated their claims and recovered only a small percentage of the damages claimed, but BDW had failed to protect its position on costs by not making an effective Part 36 Offer. The decision for this case involved looking at many of the issues that can arise on costs, including the relevance of Part 36 and Part 44 Offers, the proper interpretation of “success” in CPR 44.3 and the parties’ conduct, together with the difficulties caused by the exaggeration of a claim.
13. By reference to a number of cases in respect to the impact of parties’ conduct on cost under CPR 44.3, the Judge provided the principles to be applied in cases like this and ordered:
 - BDW to pay 60% of Brit’s costs in the main subrogated action up to the date of BDW’s Part 44 Offer which BDW effectively bettered at trial (open until 30 May 2012).
 - The costs of Brit’s experts to be excluded from these costs and borne in full by Brit because their expert evidence was fundamentally flawed.
 - Brit to pay BDW’s costs of the subrogated action from 30 May 2012, including all the costs of the trial.
 - Brit to pay 90% of BDW’s costs in the uninsured action.

Background

14. CPR 36.14 sets out the different costs consequences that apply “*upon judgment being entered*”, depending on whether a Claimant fails to beat a Defendant’s Part 36 Offer or equals or beats its own Part 36 Offer. If a Claimant rejects a Defendant’s offer and then it fails to obtain

a judgment which is more advantageous than the Defendant's offer, unless it considers it unjust to do so, the Court will order the Claimant to pay any costs (on the standard basis) incurred by the Defendant from the date on which the relevant period expired, and interest on those costs (CPR 36.14(2)).

15. CPR 44.3 gives the Court discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. CPR 44.3(2) provides that:

"If the Court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order."

16. CPR 44.3(4) states that in deciding what order to make about costs, the Court must have regard to all circumstances, including:

"(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;..."

17. CPR 44.3(5) sets out what type of conduct can be considered, including

"the manner in which a party has pursued or defended his case..." and "whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim".

18. Although the claims of Brit were exaggerated, the Judge did not find that they were dishonest or deliberately exaggerated. However, he raised the following criticisms for the purposes of Part 44:
 - The flaws and deficiencies in this claim were so obvious that there should have been a significant change of approach by Brit and their Solicitors much earlier.
 - Brit and their Solicitors adopted a consciously unhelpful attitude in the correspondence, provided the bare minimum of explanation

for many of the claims and disclosure of documents was slow and reluctant.

- Brit's expert evidence was fundamentally flawed.

The Decision

19. In the subrogated action the Judge ordered BDW to pay 60% of Brit's costs to 30 May 2012, excluding the costs of Brit's experts and of some late supplementary statements, both of which were to be borne in full by Brit. BDW's costs from 30 May 2012, including all the costs of the trial, were to be paid by Brit. In the uninsured action, he ordered Brit to pay 90% of BDW's costs. All of the costs were to be assessed on the standard basis, if not agreed.
20. The Judge stated that the principal issue concerned the proper approach to costs in a case where:
 - BDW had taken a much more realistic view of the value of the claim than Brit.
 - The Court had assessed quantum by reference to BDW's evidence rather than Brit's evidence.
 - BDW had failed to protect its position on costs by making a sufficiently generous Part 36 Offer.
21. On reflection of these criticisms the Judge considered that it would be manifestly unjust if Brit were permitted to recover the entirety of costs to 30 May 2012. However, it was not appropriate to order Brit to pay any part of BDW's costs up to that date. There was no authority in which a Claimant who had recovered more than a Part 36 Offer and made a non-negligible recovery had been required to pay a Defendant's costs. He held that BDW should pay 60% of Brit's reasonable and proportionate costs. The significant reduction of 40% was because, if Brit had adopted the same detailed approach as BDW, then the action would have settled well before 30 May 2012. However, BDW should pay more than half Brit's costs because of the absence of a suitable Part 36 Offer. He excluded from this all of Brit's costs incurred in connection with their experts.
22. The position changed once the 16 May 2012 offer was made because BDW bettered this offer, certainly in relation to the sum offered for damages and interest. The Judge decided that, on the balance of probabilities, Brit would have been better off accepting that offer rather

than going to trial. Accordingly, Brit should pay BDW's costs from 30 May 2012 (when that offer expired).

23. There was no Part 36 Offer in the uninsured action, but both parties made a Part 44 Offer. The Judge held that Brit should pay 90% of BDW's costs for the following reasons:
 - It was very unusual for the uninsured losses not be claimed as part of the subrogated action. Brit's decision to have 2 separate actions and 2 separate legal teams' inevitably duplicated costs and Brit must pay for that luxury.
 - A recovery of about 3% of the total sum claimed was a failure on a grand scale.
 - BDW bettered its Part 44 Offer of 16 May 2012 in relation to the uninsured claim.

Further Developments

24. It would seem fair to say that this area of the Law is here to stay and indeed is likely to get more rigorous.
25. A very recent case of *Bellway Homes Limited and Seymour (Civil Engineering Contractors) Limited* 4 July 2013, the Judge Mr Justice Akenhead referred to *Brit Inns Limited and Others v BDW Trading Limited* [2012] EWHC 2489 (TCC) and to the fact that the Judge Mr Justice Coulson had set out some other helpful principles, having considered various cases including the **Multiplex** case.
26. Mr Justice Akenhead, in the "Discussion" section of his Judgment, stated the following:

"48. In this case, it is not possible to make an overall issues based decision because no issues were ultimately decided by the court. All that one can say is that Bellway pursued a claim which was worth net of interest some £135,000 against its claim for £513,000 and that probably that claim was very substantially exaggerated and, given the nature of the Claim which proceeded on the basis that the burden of proof was on the Defendant, it was necessarily at least somewhat speculative; it could thus be properly said that Bellway was pursuing a claim for £513,000, which it must have known that it would only recover as a maximum some £350,000 and whether or not it recovered substantially less was a real risk which they must have known they

faced. It thus pursued a claim for £513,000 knowing that it would end up with less and could well end up with a lot less.

49. In those circumstances, I consider that it is appropriate to make a proportionate costs decision in relation to Bellway's costs. The fact that it has only recovered some 26% to 27% of its costs of their Claim does not however in logic mean that it should only recover the same percentage of its costs because it has had to pursue the proceedings to secure even that amount. In all the circumstances therefore, I consider that the reasonable, fair and proportionate recovery is 50% of its costs."

Summary

27. It is probably correct that the Allied Building case is the extreme, but there are obvious benefits to be gained by thoroughly testing your case/entitlements before pursuing any formal action.

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