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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Adjudication: claims consultants' costs

Octoesse LLP v Trak Special Projects Ltd

[2016] EWHC 3180 (TCC)

Following the successful enforcement of an adjudicator's decision, Trak asked for its costs to be summarily assessed. These costs included the costs incurred by a firm of construction claims consultants. The costs covered consideration of the claim and evidence; preparation of the defence and a witness statement; instructions to counsel; liaison with the court; and attendance at court. Trak said that they were acting as a litigant in person who through CPR Part 46.5 can recover costs *"which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant in person's behalf"*.

Octoesse said that following the CA case of *Agassi v Robinson* [2005] EWCA Civ 1507, the consultants' costs were not recoverable. They were neither work done by the litigant-in-person nor disbursements which would have been allowed if made by a legal representative.

Mrs Justice Jefford disagreed noting that where a litigant-in-person seeks to recover the costs of a consultant's assistance, the relevant question is whether, in the particular instance, the consultant's costs are recoverable as a disbursement. That question is answered by asking whether those costs would have been recoverable as a disbursement if it had been made by a solicitor. Costs would be recoverable as a disbursement by solicitors if the work was such as would not normally be done by solicitors.

The Judge further observed that there were distinct features of adjudication and adjudication enforcement proceedings which can and should be taken into account in considering what disbursements would be recoverable if made by solicitors and which would, in consequence, also be recoverable by a litigant in person. These were as follows:

(i) In the adjudication process itself, parties are often represented by claims consultants or other consultants. If solicitors are instructed on the enforcement proceedings, particularly where they have not acted in the adjudication, it would, therefore, be common practice, and in many cases necessary, for them to seek the assistance of the consultants involved in the adjudication;

(ii) Given the accelerated timetable used by the TCC in adjudication enforcement cases, it may be necessary for solicitors, for example when drafting witness evidence, to seek the assistance of those who represented the parties in the adjudication.

The Judge also noted that there had been a number of cases where the costs of claims consultants had been recovered when they provided services in connection with an adjudication enforcement, including *NAP Anglia Ltd v Sun-Land Development Co. Ltd* [2012] EWHC 51, where Mr Justice Edwards-Stuart said:

> *"In my experience it is not that common for solicitors to be instructed for the first time in a dispute following the conclusion of an adjudication and solely for the purpose of taking proceedings to enforce the adjudicator's decision. Accordingly, this is a factor which must be borne in mind when considering the reasonableness of the costs in question. I do not accept the submission...that such an arrangement inevitably involves duplication...On the contrary, I regard it as fairly self-evident that it would be more economical, in terms of both time and money, for NAP"s solicitors to take advantage of HCC"s already acquired knowledge of the documents and the issues in the adjudication, rather than read themselves into the documents from scratch. HCC will (or should) have had the facts at their fingertips and been familiar with the documentation produced in the adjudication, as well as being broadly aware of what other documents might be in the possession of NAP.*
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> *24. Nevertheless, I do not consider that the court can adopt a blanket approach to the assessment of the costs claimed in respect of HCC: they need to be looked at on an item by item basis. It is of course obvious that NAP should not be able to recover costs incurred by HCC unless those costs were directly attributable to the conduct of this application and are not greater in amount and [sic] the costs that would have been incurred by the solicitors if they had done the relevant work themselves.*
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> *25. For example, I consider that it would be reasonable for Prettys to ask HCC for its views on the contents of a witness statement served on behalf of Sun-Land in response to the application if that witness statement raised matters of detail in relation to the conduct of the adjudication or the issues raised in it."*

Mrs Justice Jefford concluded that costs incurred by claims consultants assisting a litigant in person will usually be recoverable on adjudication enforcement proceedings, assuming that those consultants acted in the adjudication. They would be familiar with the factual background and the conduct of the adjudication. The Judge dealt with the costs claimed as follows:

> *" (i) I do not consider that the costs of liaising with the Court and preparing the schedule of costs (a total of £300) are recoverable as this is very much work which solicitors normally do and where they would have no need to rely on claims consultants.*
>
> *(ii) I reduce the time spent instructing and liaising with counsel by 50%, giving a sum of £225. I do so recognising that, if solicitors were instructed, they might well seek the assistance of claims consultants in liaising with counsel but it is unlikely they would wholly rely on them.*
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> *(iii) Further, the estimated attendance at Court was 4 hours plus 2 hours travelling at the full hourly rate. The hearing lasted 2.5 hours and I would not normally expect a full hourly rate to be claimed for travelling. I reduce this amount to £525."*

Adjudication: the right to deduct LADs

Octoesse LLP v Trak Special Projects Ltd
[2016] EWHC 3180 (TCC)

The *Trak* case revolved around the interpretation of clauses 2.22 and 2.23 of the standard form JCT Intermediate Building Contract (IC 2011). Clause 2.22 provides as follows:

> *"If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Architect/Contract Administrator shall issue a certificate to that effect. If an extension of time is made after the issue of such a certificate, the extension shall cancel that certificate and the Architect/ Contract Administrator shall where necessary issue a further certificate."*

On 3 October 2014, the CA issued a certificate of non-completion. The Works were certified as practically complete on 13 February 2015. On 3 July 2015 Trak submitted a claim for an 18-week extension of time. By letter dated 9 November 2015, the CA granted Trak an extension of time of 9.5 weeks. No further certificate of non-completion was issued. Octoesse gave notice of their intention to deduct and did deduct liquidated damages from the sum stated to be due in the final certificate.

In the adjudication, and in Part 8 proceedings before the TCC, Trak argued that Octoesse was not entitled to make that deduction. Under clause 2.23.1, it was an express condition of Octoesse''s entitlement to give notice under clause 2.23.2, and to deduct liquidated damages, that the CA had issued a certificate under clause 2.22. That condition had not been met. The effect of clause 2.22 was that the certificate of non-completion issued on 3 October 2014 had been cancelled when a further extension of time had been made in November 2015. As no further certificate had been issued, the LADs could not be validly deducted. The adjudicator and Mrs Justice Jefford agreed.

Octoesse argued that the purpose of clause 2.22 was to put the Contractor on notice that the Employer may levy liquidated damages. The argument emphasised the words "where necessary" in clause 2.22. Octoesse argued that it was not necessary here for the CA to issue a further notice of non-completion because practical completion had already been achieved before an extension of time was made. Trak was already fully aware of its potential liability for liquidated damages. However, the Judge felt that this failed to give effect to the mandatory obligations imposed by the use of the word "shall" in clause 2.22. Awarding an extension of time had the effect of cancelling any certificate already issued and so the CA would have to issue a further certificate, where necessary, regardless of whether practical completion had been granted or not.

As for clause 2.23, if an Employer has given notice of his intention to deduct liquidated damages but an extension of time is then made and a further certificate of non-completion issued, then the Employer does not need to give notice of his intention again. There is a clear distinction between the Employer''s notice under clause 2.23.1.2 and the certificate of non-completion.

Here, in light of the extension of time given in November 2015, the certificate of non-completion was cancelled; no further certificate was issued and, in the absence of such a certificate, the condition in cl. 2.23.1.1 was not fulfilled. Therefore Octoesse was not entitled to deduct liquidated damages.

Rate of interest

Harlequin Property (SVG) Ltd & Anr v Wilkins Kennedy
[2016] EWHC 3233 (TCC)

One of the issues thrown up by this case was the question of the applicable rate of interest. The Claimant had been found to have made certain overpayments which it was entitled to recover. Mr Justice Coulson was referred to a number of cases including *Hunt v Optima (Cambridge) Ltd* [2013] EWHC 1121 (TCC). The Judge noted that all the cases made it clear that :

> *"the object of an award of interest is to compensate a claimant for being kept out of the money that should have been paid to him as damages".*

In the case here, the Judge concluded that:

(i) This was not a case in which interest was claimed as special damages. The claimant did not borrow any money so it did not incur any interest charges or suffer any actual loss in consequence of the overpayments.

(ii) In fact, the attempt to claim interest as general damages was an "*unsubtle attempt to create a windfall for the claimant by recovering interest at a rate which it never incurred and would never have incurred, even if there had been no overpayments*".

(iii) The claimant did not borrow money and, on the balance of probabilities, it would never have been lent any money because of its complete lack of financial security and credit-worthiness. Therefore it would be "*wholly wrong in principle*" for the claimant to try and increase the recoverable interest rate.

(iv) Any comparison with a hypothetical company who may have been able to borrow money was artificial and unhelpful.

(v) The rate of interest should reflect *"the real cost of borrowing incurred"*. The real cost of borrowing at the relevant period was low and he right approach was to award a percentage over the base rate.

Accordingly, Mr Justice Coulson concluded that the real cost of borrowing in the case here would be reflected by a rate of 1.5% above base for the relevant period. This reflected the *"commercial reality of borrowing and investing at the relevant time"*, yet did not reward the claimant.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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