Neutral Citation Number: [2012] EWHC 51 (TCC)

Case No: HT-11-342

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/12

Before:

MR JUSTICE EDWARDS-STUART

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Between:

NAP ANGLIA LTD	**Claimant**
- and -	
SUN-LAND DEVELOPMENT CO. LTD	**Defendant**

- -
- -

Ms Alexandra Bodnar (instructed by **Prettys Solicitors**) for the **Claimant**
Mr Thomas Worthen (instructed by **Bennett Griffin LLP**) for the **Defendant**

Hearing dates: 27 October 2011

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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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MR JUSTICE EDWARDS-STUART

Mr Justice Edwards-Stuart:

Introduction

1. This judgment concerns the costs of an application by the Claimant ("NAP") to enforce the decision of an adjudicator, Mr C J Hough, given on 7 August 2011. By a judgment dated 3 November 2011 I gave summary judgment in favour of NAP for the amount awarded by the adjudicator in respect of NAP's claim, namely £96,334.41, but I refused that application in so far as it related to the adjudicator's fees and expenses in the sum of £9,855. This was because the adjudicator had directed that these fees were to be paid by the Defendant ("Sun-Land") only when they had been paid to the adjudicator by NAP. NAP had not paid these fees by the time it brought the claim.

2. However, in the light of NAP's financial position I directed that execution of the judgment in excess of £65,000 should be stayed. Thus, in terms of cash flow, NAP recovered about 60% of the sum claimed.

3. As I mentioned in the judgment, the unusual feature of the case is that the adjudication took place concurrently with a claim in the Norwich County Court in respect of the same dispute, namely the value of the NAP's final account. In those proceedings NAP was and is representing itself. In the adjudication it instructed claims consultants, Henry Cooper Consultants Ltd ("HCC"). For this application it instructed Prettys. They were instructed for the first time on 23 August 2011, having had no previous knowledge of the case.

4. On the basis of the evidence before me at the hearing of NAP's application on 27 October 2011 I reached the conclusion that the county court proceedings would probably be concluded early this year and that a judgment might be expected in March. Those proceedings will, of course, finally determine the position as between the parties, there having been no prior agreement that the adjudicator's decision should be final and binding. The effect of all this, assuming that NAP is successful in the county court, is that it will have received £65,000 some five or six months before it would otherwise have done if it had not referred the dispute to adjudication.

The contentions of the parties

5. NAP submits that, in the light of the manner in which the defence to the application was conducted by Sun-Land, it should have its costs on an indemnity basis and that they should be assessed in the full amount claimed.

6. Sun-Land submits, by contrast, that there is no justification for an award of costs on an indemnity basis and that, since NAP recovered about 60% of the sum claimed, it should have 60% of its costs. However, this submission implicitly proceeds on the footing that the time spent on the various issues raised by the application was in direct proportion to the amount claimed in relation to each issue. That is clearly not the case. For example, NAP's application in relation to the adjudicator's fees was, in my view, plainly hopeless and I dismissed it in two paragraphs. It took up virtually no time at the hearing.

7. Sun-Land raised a number of defences to the application for summary judgment, two of which were abandoned before the hearing. In relation to one of these, an allegation that the adjudicator delivered his award out of time, I was very critical of the conduct of Sun-Land's solicitor. He had himself agreed the adjudicator's request for an extension of time in an e-mail, but he subsequently forgot that he had done this and instead made the allegation that no such extension had been granted. In my judgment I said that to make an error as fundamental as this was not acceptable. Although this was not an issue which is likely to have given rise to significant wasted costs, it was a very unattractive feature of Sun-Land's defence to the application.

8. Another matter of which I was very critical in the principal judgment was the fact that attached to a witness statement of Sun-Land's solicitor served on 20 September 2011 were two ring binders' worth of assorted and unpaginated documents. The witness statement gave no indication as to the purpose for which these documents had been exhibited and, of course, presented in that way, they were completely useless as material for a hearing. Unsurprisingly, they were not used.

9. In resisting the application for indemnity costs Sun-Land makes the point that a more appropriate sanction for serving documents in this manner is to allow a greater sum than might ordinarily be considered necessary or reasonable for attendance on documents. I accept this submission.

My decision on costs in principle

10. Whilst I consider that it is arguable that Sun-Land's approach to the defence of NAP's application verged on the borderline of the type of conduct that might attract an award of indemnity costs, the fact remains that it succeeded in resisting NAP's claim to a significant degree - since what the application was really about was cash flow. In these circumstances I do not consider that it would be appropriate to award costs on an indemnity basis.

11. In my view the fair and appropriate order is that NAP should be awarded a proportion of its costs to reflect both the degree of success and the time spent on the issues on which it lost, or lost in part. As I have already indicated, the issue in relation to the adjudicator's fees took up very little time.

12. Sun-Land's fallback position of seeking a stay of any sum awarded by way of summary judgment was based on a number of grounds. For an example, it submitted that the existence of the county court proceedings and the potential conclusion of those proceedings within about six months were of themselves good reasons for staying the execution of any judgment. In addition, it asserted that NAP would be unable to repay any amount that it might recover on its application in the event that it was unsuccessful in the county court proceedings. I rejected this submission as put, but I did accept that NAP might well be unable to repay the full amount claimed if I refused any stay of execution. On this part of the application, therefore, Sun-Land was successful in part. I doubt whether more than about 15% of the hearing time was spent on this discrete aspect of the submissions in support of a stay: it may well have been less.

13. Looking at the matter broadly I consider that the appropriate proportion of NAP's costs that should be paid by Sun-Land is 85%. I should add that in reaching this figure I have not overlooked the fact that Sun-Land's unsuccessful, and eventually abandoned, application to adjourn the hearing has already been dismissed with costs.

The assessment of NAP's costs

14. This gives rise to two issues. The first is the extent to which some of the individual items claimed were reasonably incurred or are reasonable in amount. The second raises a more difficult question of principle.

15. Some of the costs claimed are in respect of time spent by HCC, who provided assistance to Prettys. Sun-Land contends that such costs are not recoverable as a matter of principle, although it has cited no authority in support of this position in its written submissions.

16. In my judgment, it is now established that a party to an arbitration can be represented by claims consultants and that the costs incurred, if awarded to that party, can be assessed either by the arbitrator or by the court (in spite of the fact that they are not costs incurred by solicitors): see *Piper Double Glazing v DC Contracts* [1994] 1 All ER 177 (Potter J).

17. This decision was cited with approval by the Court of Appeal in *R (Factortame) v Secretary of State for Transport* [2003] BLR 1, at paragraph 26. In that case, the claimants instructed the accountants, Grant Thornton, to carry out work on their behalf under the overall direction of a partner in Thomas Cooper and Stibbard, the City solicitors. Grant Thornton originally proposed to act on an hourly rate basis, with a cap set at 8% of the damages recovered, but were ultimately prevailed upon to act for a straight 8% of the damages.

18. The claimants had been driven into impecuniosity by the protracted and fiercely fought litigation against the government and Grant Thornton was already owed a substantial sum by way of fees for its work on the quantum of the claim. By the time that the arrangement was concluded the claimants had already succeeded on liability (subject to any final appeal) and Grant Thornton had no prospect of recovering the fees that it had already incurred unless the claimants recovered substantial damages. It was against this background that Grant Thornton entered into the arrangement with the claimants.

19. The main issue that concerned the court was the propriety of Grant Thornton's remuneration in the form of a percentage of the damages recovered and whether, in consequence, Grant Thornton's fees were recoverable as costs. These fees included sums paid to third parties. The costs judge held that Grant Thornton's fees were recoverable as costs, and the Court of Appeal agreed.

20. From these two authorities I derive the following three propositions:

    (1) Sums paid to a third party incurred solely for the purpose of advancing or assisting with the prosecution or defence of a claim may in principle be recoverable as costs provided that the third party is not doing any acts that

only a solicitor can do and/or does not do any act whilst purporting to act as a solicitor.

(2) It does not matter that the work done by the third party, even if it employs non-practising barristers or solicitors to do it, is work of a type commonly done by solicitors.

(3) The costs of a third party engaged in these circumstances may be assessed by the court. To be recovered, they must have been reasonably incurred and be reasonable in amount.

21. In the light of these conclusions I reject Sun-Land's submission that the sums paid to HCC are irrecoverable in principle. Accordingly, I now move on to the issue as to whether the particular sums claimed were reasonably incurred and are reasonable in amount.

22. When considering this I bear in mind the fact that, as already mentioned, Prettys were not involved in either the county court proceedings or the adjudication. They were instructed solely for the purpose of bringing this application for summary judgment.

23. 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 made on behalf of Sun-Land that such an arrangement inevitably involves duplication of work and therefore of time. 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.

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 the costs that would have been incurred by the solicitors if they had done the relevant work themselves.

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.

26. Guided by these considerations I now turn to the costs claimed by NAP in relation to the work done by HCC.

15 and 19 August 2011

There is a claim for 3 hours spent on discussions with NAP about the options open should Sun-Land fail to pay the adjudicator's award. Upon the information available I am not persuaded that these costs, which were incurred before Prettys were instructed, are properly attributable to the application. I therefore disallow these 3 hours.

22, 23 and 26 August 2011

2 hours are claimed for preparing documents to be sent to Prettys and ½ hour for reviewing a letter from Sun-Land's solicitors and discussing its contents with NAP. I disallow the latter time, but I consider that the time spent on the preparation of documents was reasonably incurred and is reasonable in terms of time. The hourly rate of the fee earner at HCC, Mr Broughton, is £100 per hour, which is less than the charge out rate for a trainee at Prettys. I therefore regard the sum claimed as reasonable in amount also.

1 September 2011

1½ hours are claimed for reviewing a witness statement served by Sun-Land and providing Prettys with a commentary regarding the issues that Sun-Land was claiming had not been addressed by the adjudicator. I can see nothing unreasonable about this: the time claimed is reasonable and so I allow this item.

22 September 2011

3½ hours are claimed for reviewing a further witness statement served by Sun-Land and the two lever arch files of documents served with it. These must be the documents served with the witness statement dated 20 September 2011 to which I have already referred. The time spent appears to me to be eminently reasonable and so I allow this item also.

27 September 2011

1 hour is claimed for reviewing the current situation in relation to the documents served by Sun-Land. This seems to me to be reasonable and so I allow it.

19 and 20 October 2011

3 hours are claimed for obtaining a full copy of NAP's accounts (2 hours) and checking the draft and final versions of a witness statement to be served by Prettys (1 hour). The need for the accounts had arisen because of the allegations made by Sun-Land in relation to NAP's financial position and I see nothing unreasonable about these being provided by HCC or the time spent. Similarly, I regard the time spent checking the witness statement to be reasonable. I therefore allow these 3 hours.

24 October 2011

1 hour is claimed for sorting and providing copies of Referral documents as requested by NAP's counsel. I have no doubt that this is reasonable. I therefore allow this item.

27 October 2011

7 hours are claimed for attending the hearing of the application for summary judgment. I am told that this is because a representative from NAP was unavailable and that it was felt necessary to have someone present at the hearing who was familiar with the details of the adjudication. I see nothing unreasonable about this, and so I allow this item. However, I do not see why Sun-Land should have to pay for the 2 hours spent by Mr Broughton of HCC on the train returning from the hearing. He could have spent the time doing other work. I therefore allow 5 hours.

Conclusion

This produces a total of 17 hours at £100/hour, plus VAT, namely £2,040 in all. In addition, I allow £104.90 in respect of travel costs. Subject to my arithmetic being correct, those are the sums sum that I allow.

27. I now turn to the costs claimed by Prettys.

28. For the reasons given in paragraph 10 of NAP's second submissions on costs, I accept the costs claimed under the first three heads in the schedule of costs. It was not unreasonable for NAP to instruct solicitors in order to bring these proceedings for summary judgment and those solicitors inevitably had to read into the case, albeit to an extent that was less than would have been necessary if HCC had not been instructed also. Any duplication as a result of having two trainees appears to have been minimal and so I ignore it. I am prepared to allow the 4 hours spent by the partner in charge of the case: it seems to me that the partner in charge of any litigation needs to acquaint himself or herself with the basic facts underlying the claim at the outset. I do not regard the hourly rate of £275/hour as unreasonable, although I accept that it is probably higher than the typical local rate.

29. Over 28 hours is claimed as time spent working on documents, the great majority of it by Carolyn Porter, the solicitor with day-to-day conduct of the case. Ordinarily I would be sceptical of such a large amount of time being spent on a case such as this. However, given the detailed nature of some of the issues raised by Sun-Land, including an allegation that the adjudication raised "*far too many issues to be considered fully in a short adjudication timetable*" (paragraph 8 of Mr Diamond's first witness statement), it was inevitable that much time would be spent on the documents in this particular case. Further, as I have already indicated in relation to HCC's costs, Sun-Land has only itself or its solicitors to blame for attaching to a witness statement two ring binders' worth of assorted and unpaginated documents without providing any explanation of their purpose. It is far more time consuming to read a bundle of documents if one is given no clear indication of their relevance. By contrast, if one knows what one is looking for, it can be done more quickly because some documents can often be just skimmed through. In my view, it does not lie in Sun-Land's mouth to complain that these hours are unreasonable: I consider that they were reasonably incurred and are

reasonable in amount in the unusual circumstances of this case. I therefore allow this item in full.

30. For reasons similar to those given in relation to HCC, I disallow the 2 hours claimed for the return journey on the train after the hearing.

31. I therefore allow all the costs claimed by Prettys, less £340, namely £10,115.50.

32. As to counsel's fees, I regard these as entirely reasonable. Whilst the £2,500 for pre-hearing advice and so on is on the high side, the brief fee of £500 is modest. A brief fee often includes a pre-hearing conference and so the amount claimed in respect of counsel's fees should be looked at in the round. I allow the £3,000 claimed. It is clearly reasonable in amount.

33. By my calculations this produces a total of £16,803.60 and that is the sum that I allow in respect of the fees of Prettys and counsel, subject to any arithmetical mistakes (the parties are to agree an adjustment of this amount if there are any arithmetical mistakes).

34. Prettys are to draw up an order to reflect the contents of this judgment. The sums that I have assessed as recoverable are (subject to any arithmetical mistakes) to be paid within 14 days.