Bingham's Corner

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READY FOR THE CHOP

I WANT MY LEGAL COSTS & LEAVE

Two parties got into a scrap over what constitutes a construction contract. When the winner asked for its hefty costs to be paid by the loser, that's when the judge got his axe out.

This is a story about claiming lawyers' costs, when adjudication is followed by litigation on the same dispute. In short, all the effort in the adjudication was lifted by the same lawyers and repeated more or less when it came to litigation in the High Court. What's more, the winner in the adjudication won again when the whole matter was tried afresh in the High Court. So, if the rule, simply put, is that the winner can have its costs paid for by the loser, the issue is "what costs?"

Let me tell you what the quarrel was about. The office supply giant Spicers Ltd has a whopper of a warehouse in Smethwick. They decided to contract with Savoye and Savoye Ltd for a whopper of a conveyor contraption for upwards of £2.5m supply and fix. It was all done but then a row broke out worth £900,000. An adjudication notice pinged its way from Savoye to Spicers. Dear me, no, said Spicers' lawyers, a conveyor system isn't a construction contract, so off you toddle. Construction lawyer adjudicator, Mr Jonathan Hawkswell, said, dear me, no to Spicers' objection and pressed on. His award required Spicers to stump up the £900,000. They refused. So Savoye sought to enforce. There was a trial on the same issue: is it a construction contract? Mr Justice Akenhead said yes.

By now that quarrel, about the scope of the Construction Act and whether you can adjudicate and whether this was a construction contract, had run up legal bills for Savoye alone of £202,000. Assume Spicers' bill is about the same. So, £400,000 has been spent asking about the exclusion in the Construction Act. The exclusion from adjudicating applies to some engineering works but not others. The judge said the exclusions from the ambit of the Construction Act were historical:

> "... the arguments of various interest groups persuaded parliament that they should be excluded from its ambit. There is no particular logic in their exclusions other than that the industries in question were considered to be sufficiently important and (possibly) strategic to justify exclusion."

To be fair, in 1996 when the bill was going through parliament, a fair number of lawyers were horrified by this 28-day dispute decision-making idea. A fair number of lawyers are still horrified: they want trials, the bigger the better. Though I can't figure why.

So, as to the winner's costs, the judge said:

> "It is also clear from reading the adjudication documentation, that the exact same point raised in the court proceedings was raised and argued before the adjudicator with extensive written witness evidence being provided by each party... Essentially, the court proceedings involved a re-run of the same arguments and evidence, albeit I do accept that the later proceedings went into somewhat greater detail and in some respects had a different emphasis. Of course, each party in the adjudication had to pay its own costs. This context would lead to the inference that the costs of the court proceedings could have been relatively modest, taking into account that the legal team knew exactly what the issue was about and what evidence needed to be deployed in the court proceedings to counter the likely jurisdictional challenge."

On the face of things in litigation, Savoye was entitled to its lawyer's fees of £202,000 from Spicers. But the court would not award more than £97,000. First the judge decided that one side spending £202,000 on a claim worth £900,000 was disproportionate. Then he dealt with the overlap between adjudication and litigation: "Savoye was dealing with an issue in the court proceedings, which it had addressed (at its own cost) in detail in the adjudication; it was deploying the same solicitors and principal factual witness as it had deployed in the adjudication. The issues raised in the court proceedings were not complex, as is at least partly evidenced by the fact that the overall hearings ran to less than two court days. Of course, some of the costs, such as those occasioned by Spicers' application to adduce further evidence, were incurred as a result of something which was not in any way Savoye'sfault.

> "If no other information was available other than the headline costs figure, I would have been minded to identify a figure of about half of the costs some claim as proportionate."

Then he went on to consider the "large amount of partner's time", which was "much more than simply supervise a very competent associate solicitor and liaise with the client". So, the partner's 111 hours were reduced to 20. In fact, he said, the whole time charge of 364 hours was not reasonable. The barrister's fees were even chopped by half.

And all this was brought about by a technicality about what a construction contract is. Isn't it time to bring all and any commercial dispute into scope? Come on parliament, have a think.

Photo by Dan Edwards, UK