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Dispatch

Adjudication enforcement & Part 36 offers

Sleaford Building Services Ltd v Isoplus Piping Systems Ltd

[2023] EWHC 1643 (TCC)

We discussed this case in Issue 275. Mr Alexander Nissen KC had enforced an adjudicator's decision made in favour of Isoplus and dismissed Sleaford's Part 8 claims. The Judge then had to consider two consequential issues relating to costs.
Isoplus said that, as a result of recovering more than the Claimant's Part 36 offer to Settle, which it made before the issue of the enforcement proceedings, in accordance with CPR r.36.17(4), it was entitled to enhanced interest, indemnity costs and an additional amount comprising 10% of its claim. Isoplus further said that Sleaford should, in any event, be liable to pay costs on an indemnity basis irrespective of its Part 36 offer.

The Part 36 offer was in the sum of original adjudicator's decision, £323,502.32. When interest was added to that decision, the sum awarded by the Court was £326,586.60. However, at the date of the offer, the period of interest which Isoplus was offering to forego was ten days and had a monetary value of c. £350.

The Judge considered that Isoplus had made a valid Part 36 Offer. Under CPR r.36.17(4), a Court must order that the claimant, Isoplus, is entitled to the benefits set out above, where it recovers a sum in excess of the offer to settle figure, which it did here, unless it considers it unjust to do so". Sleaford said that it would be "unjust" for the Court to make such order in favour of Isoplus for the following reasons:

(i) Isoplus had made an alternative offer to that contained in its Part 36 letter which was accepted by Sleaford. That offer was more favourable to Sleaford than that made in the Part 36 offer.
(ii) The Part 7 enforcement proceedings were unnecessary and should never have been issued. They were duplicative, contrary to the TCC guide. Sleaford was only given one working day to respond to the alternative offer. Had Isoplus waited, it would have been clear that no proceedings were needed.
(iii) The purpose of the Part 36 regime is to allow parties to make and accept sensible offers. It does not apply in circumstances where an alternative offer was made concurrently with the Part 36 offer, which had been accepted. The matter was resolved by consent.
(iv) The Part 36 offer was not a genuine attempt to settle the proceedings but instead was purely tactical.

Isoplus said, and the Judge agreed, that the burden on a party who has failed to beat a Part 36 offer to show injustice was a formidable obstacle to the obtaining of a different costs order. Isoplus noted that the parallel offer, which was accepted, was merely to stay enforcement until the hearing of the Part 8 claim. It did not stop interest accruing in the meantime. Had the Part 36 offer been accepted, Isoplus would not have been entitled to any further interest, to be contrasted with what actually happened, namely that interest has accrued in the meantime. Had the offer been accepted, the costs of the Part 7 proceedings would not have been incurred. The offer was made before the proceedings were issued and was a genuine attempt to settle the proceedings in that it made a concession, albeit a small one.

The Judge accepted that the parallel offer, which was accepted, was not concerned with the substantive obligation to make payment, and did not stop the accrual of interest. It did not, therefore, cut across the ability of Sleaford to accept the Part 36 offer. Further, the Judge did not agree that the issue of Part 7 proceedings was unnecessary. Sleaford had had from 23 December 2022 to make payment but did not. Isoplus were given two further opportunities to make payment on 3 January 2023 and 23 February 2023. It was neither unreasonable, nor premature, for Sleaford to have made preparations to issue, and then issue, those proceedings on 15 March 2023. When Sleaford, issued its own Part 8 proceedings, Sleaford ought already to have already considered what its attitude to payment of the adjudicator's decision was going to be, including on questions of interest. It could have made proposals to Isoplus at that time.

That said, the Judge did agree that, viewed objectively, the offer was not a genuine attempt to settle the proceedings. The offer, if accepted, required Sleaford to pay the whole of the principal amount decided by the adjudicator to be due. That was not really much of a concession at all in circumstances where adjudication enforcement tends to produce an all or nothing outcome save in severance cases. In reality, all that Isoplus was offering was to forego interest for a short period. In some cases, foregoing interest may amount to a genuine and realistic element of compromise, but this was not such a case.

The Judge noted that, at the date of the offer, the period of interest which Isoplus was offering to forego was a mere ten days and had a monetary value of c. £350. Expressed as a percentage of the claim it was 0.1%. Accordingly, the offer was to accept payment of 99.99% of the claim. It was also relevant to weigh in the balance that, had the Judge been satisfied that the reduction of c. £350 was a genuine offer, Isoplus would, all other things being equal, be entitled to an additional payment of £32,250.23, being the prescribed 10% uplift, as well as being entitled to recover both interest at a special rate and indemnity costs.

It would, therefore, in all the circumstances, be unjust to make the order sought by Isoplus.

Isoplus also sought their costs of the Part 7 proceedings on an indemnity basis. Isoplus referred to the following cases:

(i) *Croda Europe Ltd v Optimus Services Ltd* [2021] EWHC 2606, where the Judge said that in the context of adjudication enforcement: *"It is the usual practice of this Court to make a summary assessment of costs and to do so in the indemnity basis."*
(ii)*Bravejoin Company Ltd v Prosperity Moseley Street Ltd* [2021] EWHC 3598, where the Judge said: *"the courts have said that because adjudication enforcement is so important, the normal approach is to award indemnity costs in adjudication enforcement cases."*

Isoplus argued that these cases reflected "a sea change" in approach from that described in *Coulson on Construction Adjudication* 4th edition published in 2018. Here the author said: *" If the claim is not admitted, but the claimant is not successful at the enforcement hearing, he will often seek his costs on an indemnity basis. In the ordinary case, where a respectable but ultimately unsuccessful point is taken by the defendant, that will usually not be appropriate. But if the judge is not persuaded that there was ever any defence to the claim for enforcement, costs on an indemnity basis will be awarded...it must always be remembered that the test for indemnity costs is a high one and will not ordinarily be granted".*

Sleaford referred to the case of *Superblast (Nationwide) Ltd v Story Rail Ltd* [2010] BLR 211 where Akenhead J said that he would not order indemnity costs, even though there was an absence of reality about the defence advanced, because it was not put forward in bad faith, unprofessionally or wholly unreasonably.

The Judge here commented that:

"For what it is worth, I do not regard the observations in the two cases relied upon above as demonstrating a new approach. They rightly recognise, albeit in pithy statements, that in many cases of adjudication enforcement, there really never was a defence and to argue otherwise is often hopeless and lacks reality."

That said, the Judge did consider that this was a suitable case for indemnity costs in any event in relation to the enforcement proceedings. In reality here, there never was a defence to the claim for enforcement and no basis to dispute the claim. It was a "classic" case where indemnity costs should be awarded. Sleaford had merely wanted to put off payment for as long as possible.

Indemnity costs

Denny v Babaee & Ors

[2023] EWHC 1490 (TCC)

Denny brought claims that there were significant defects to their new house caused by dampness. The claims were successful and HHJ Pearce had to consider the question of costs. Denny sought costs on an indemnity basis; the Defendants said the costs should be reduced because the valuation of Denny's claim changed during the course of proceedings.

The parties had relied on expert valuation evidence. Denny's first expert valued the cost of repairs and reinstatement at around £475k. - a figure revised upwards to £721k. In the end, Denny relied on a second expert who valued the cost of the necessary works at £485k. The Defendants suggested that the initial overstatement of the value of the case should lead to a reduction of Denny's costs. Although the Defendants did not file any further submissions, the Judge considered that the Defendants were saying that Denny should be penalised for relying earlier in the case on the higher figures or that additional costs were incurred because Denny initially put their case on exaggerated figures.

The suggestion was rejected. There was no suggestion of misconduct or that the overstatement of the valuation was deliberate or reckless conduct. And, whilst it might have been possible to argue that avoidable costs had been incurred because of the exaggerated value put on this aspect of the claim (for example, through the costs of the Defendants' expert considering this aspect of the case), no material had been provided to the court.

Denny sought indemnity costs on the grounds that the Defendants had been uncooperative - failing to engage and/or to deal with the case in a realistic manner, thereby incurring additional costs. Further, the Defendants engaged in mediation and came to an agreement in principle but then failed to see that settlement agreement to completion. The Judge did not accept the first issue. The lack of cooperation and the failure to engage with proceedings were, like the change in value of Denny's case: "*features of the rough and tumble of litigation.*"

The parties engaged in mediation in November 2022 and entered into a settlement agreement, dated 29 November 2022, signed by Denny and the First Defendant. It was not possible to reach a binding agreement for the sale of the land because of the provisions of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989, but the settlement agreement provided, in essence, for the house to be subject to independent valuation followed by the purchase by either the First or the Third Defendant (or their nominee) at the valuation price. In addition, the Third Defendant was to pay Denny the sum of £200k by way of damages. Whilst a joint valuation was obtained, the Defendants did not fulfil their side of the bargain by purchasing the house.

The Defendants said that they had wanted to obtain their own valuation in order to raise funds to buy the house. The difficulty with this explanation was, of course, that the agreement was clear on its terms. The Defendants had contracted to buy the house at the figure in the independent joint valuation without reservation. This meant that there were "ample grounds" to conclude that, in respect of costs incurred after the Defendants reneged on the agreement, an order for indemnity costs should be made. This would penalise the Defendants for agreeing terms and then not carrying them out, conduct which was well outside of the norm and sufficient to justify the censure of the court. The Judge said that:

"The purpose of the order is to mark disapproval of conduct that its likely to incur unnecessary costs rather than compensating the party who has actually incurred those costs."

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.

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