

CONSTRUCTION

Issue costs

Costs drastically reduced in claim for £3.5 million, where less than £165,000 awarded at trial - *Costain Ltd v Charles Haswell & Partners Ltd* [24.09.09]

Specialist consulting civil engineers Haswell designed foundations and a ground treatment system, the cost of which was included by construction and civil engineering contractor Costain in a tender to United Utilities Water Ltd, for the construction of a water treatment works at Rivington, Lancashire. However, after the contract had been concluded, Haswell recommended piled foundations at a much greater cost because the required ground bearing strength could not be met by the original design.

The trial Judge in the Technology and Construction Court found Haswell negligent in its original design and gave judgment for Costain. It is clear that, on the evidence considered by the Judge, such a finding was correct and unsurprising.

What is of greater interest is the award of costs. Costain originally claimed about £3.5 million, although the total progressively reduced so that on the last day of evidence it stood at £1,257,377 excluding interest. The sum awarded to Costain by the court was £163,479; but the case took 14 days to try and cost both parties about £2.9 million. At no time did Haswell make any Part 36 offer or any offer of money in settlement.

Decision

The Judge began from the premise that Costain was the successful party in the litigation and had recovered a "*substantial*" sum of money. He rejected Haswell's assertion that the claim was exaggerated, such that Costain should not recover any costs, on the basis that Haswell could have protected itself by making a Part 36 offer, but did not do so.

The Judge then went on to deal with Haswell's argument that any award of costs should be reduced because of Costain's alleged misconduct in the following respects:

- Exaggeration: the Judge found that the claim was initially exaggerated.
- Making and pressing claims unreasonably: of the three heads of loss claimed, the Judge found two (piling and prolongation works) "*not unreasonable*" but that one (winter working) was unreasonable, there being

no evidence to support it.

- Offers of settlement: Costain made offers to accept £1.89 million including interest and, later, £1.76 million including interest and costs or £1.15 million plus costs. Haswell's response to the last offer was a 'drop-hands' proposal, meaning each party would pay its own costs and withdraw all claims. Haswell asserted that Costain acted unreasonably in making these offers and rejecting their 'drop-hands' counter-offer. The Judge rejected this argument, viewing the position "*through the eyes of Costain at that time*". He also appears to have been influenced by Haswell's failure to protect itself by making any Part 36 offers and its apparent out of hand rejection of Costain's offers.

Haswell also argued that Costain had failed on a large number of contested issues and here they had rather more success. The Judge looked at the issues which Costain had won and lost and estimated that 65% of the trial had been taken up by the issues on which they succeeded and 35% by Haswell's successes. He then brought conduct into account, reducing Costain's recovery to 55% and Haswell's to 20%. The net result, setting off one against the other, was that 38.75% of Costain's costs were payable by Haswell - a sum in the region of £620,000, out of Costain's total bill of £1.6 million.

Comment

This judgment is a salutary lesson for those who make over ambitious claims (Costain came out just shy of a £500,000 loss on the exercise), and those whose defence is to stonewall and make no attempt to negotiate (Haswell paid its own costs plus £620,000 and the judgment sum; something in excess of £2 million). As one might sometimes hear: "*only the lawyers won*"!

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