JUDGMENT : His Honour Judge Thornton QC. TCC. 23rd August 2006.

Introduction

1. I handed down judgment in the two claims relating to the enforcement of adjudicators' decisions on 10 July 2006. The effect of that judgment was that Bennett was to pay MSP a net sum, after interest and VAT were taken into account, of £16,026.77 with no order as to costs.

2. The order giving effect to this judgment has not yet been drawn up. Applications have been made by both parties in writing for me to vary the draft costs order and a further application by MSP to varying the precise net sum that the draft order provides for Bennett to pay MSP. These applications were supported by written submission from Bennett dated 20 July and 1 August 2006 and from MSP dated 27 July 2006.

Bennett's Costs Order Application

3. This application was based on the terms of a letter dated 14 March 2006 which it was submitted had the effect of being a Part 36 offer which had been refused by MSP but had subsequently been bettered by the proposed judgment sum. However, on MSP pointing out that the offer had marginally bettered the proposed judgment sum once interest and VAT were fully taken into account, Bennett accepted that it could not rely on the letter and withdrew its application.

MSP's Costs Order Application

4. MSP contended that my proposed costs order, and the reasoning that supported it, did not fully or fairly take account of the principle that "*he who draws the cheque should pay the costs of obtaining it*". In other words, since the net result of both actions taken together was that Bennett was paying MSP in excess of £16,000, Bennett should pay all MSP's costs. In support if this contention, MSP relied on ***Day v Day*** (2006) EWCA Civ 415, a recent decision of the Court of Appeal, and on the suggested general principle resulting from the application of the CPR and, in particular, the overriding objective. Bennett opposed this application.

5. The decision in ***Day's*** case, and in particular this passage from the judgment of Ward LJ, provides helpful guidance to the exercise by me of my discretion to award costs in this case. This passage, with the particular passages underlined and emboldened by me, is particularly helpful:

> *"The court, as it is now well known, has wide powers, including the power to apportion costs or to make issue-related orders for costs. Our attention has been drawn by both counsel to an unreported case of* ***Johnsey Estates v Secretary of State for the Environment*** *[2001] EWCA Civ 535, a landlord and tenant case where there was a claim, broadly speaking, of about one million pounds, a payment into court of about £200,000 and a judgment for a further £236,000. In his judgment, with which the other members of the court agreed, Chadwick LJ stated the applicable principles to be these (paragraph 21):*
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> > *"(1) Costs cannot be recovered except under an order of the court; (2) the question whether to make any order as to costs – and, if so, what order – is a matter entrusted to the discretion of the trial judge; (3) the starting point for the exercise of discretion is that costs should follow the event; nevertheless (4)* ***the judge may make different orders for costs in relation to discrete issues – and in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another, and, in that event, may make an order for costs against the party who has been generally successful in the litigation****; (5) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue; (6) an appellate court should not interfere with the judge's exercise of discretion merely because he takes the view that it would have exercised that discretion differently."*
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> *"22. The last of those principles requires an appellate court to exercise a degree of self restraint. It must recognise the advantage which the trial judge enjoys as a result of his 'feel' for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it had first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out of account; left out of account matters which should have been taken into account; or reached a conclusion which was so plainly wrong that it can be described as perverse – see* ***Altrans Express Ltd v CVA Holdings Ltd*** *[1994] 1 WLR 394, per Lord Justice Stephenson at page 400C-F and Lord Justice Griffiths at page 403G-H."*
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> *15.* ***The first question, therefore, is whether the judge was correct in characterising the outcome of this litigation as a draw****. Mr Margolin contends in effect – these are not his words but mine – that it was a no-score draw in the sense that both parties' main shots at goal missed, and neither managed to score any goal at all. The case therefore petered out as a stale draw because the fallback position was maintained by the judge.*
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> *16. We must ask ourselves whether the primary rule applies in this case – the general rule, that is, that the unsuccessful party will ordinarily be ordered to pay the cost of the successful party unless the court thinks otherwise. The question is, which, if any, of these parties did enjoy success in this litigation? We were referred to a judgment of Lightman J in* ***Bank of Credit and Commerce International SA v Ali (no.3)*** *[1999], NLJ 1734 Vol. 149 where he said that:*
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> > ***"For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense."***

> *17.* ***I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case; and there is absolutely no doubt at all that the person who has to put his hand in his pocket and pay up the money that is in dispute was Phillip. He failed; his mother succeeded.*** *She succeeded, all the more so, because Phillip adamantly and persistently refused to pay her a penny piece, notwithstanding his fallback position. So I am in no doubt at all that this case did not end in a draw, but ended in victory for mother. Therefore the ordinary rule should apply, and the judge was correct in applying it to the cut off point of 14 February; but was, I regret to say, in error in failing to apply it for the costs of the hearing. That hearing was necessary.*

6. In this case, as I have already found, each side brought a discrete adjudicator's enforcement claim against the other and raised similar contentions as to why it should recover its claim in full and not be liable for any part of the other's claims. Thus, although the two rival claims were not identical, the principal stance taken by each party was the same: "***I win, you lose"***, and the issues to be decided were similar on each claim. It follows that each side has had to "write a cheque" and, moreover, I decided the core issues in a similar way so that my reasoning partially supported and partially different from both parties.

7. I conclude that in exercising my discretion as to costs, ***Day v Day*** requires me, in a case such as this one, to consider whether each side both won and lost and, if so, whether the end result can fairly be characterised as being one where "*one side has written a cheque"* or as one where the end result is a draw. It is an unnecessary refinement for me to decide whether or not any resulting draw is of the score or no score variety.

8. For the reasons I have already given, and taking them all together and in the round, I am satisfied that the end result was a draw and that the small financial advantage to MSP that has resulted is not such as to entitle it to its costs or any part of them on the "***writing the cheque***" principle.

9. I therefore confirm my "***each party pays its own costs***" order.

Amendment of Judgment Sum

10. MSP contends, for the first time, that the sum Bennett was awarded on its claim should be reduced by £694.53 being the VAT element it paid the adjudicator on the sum it paid the adjudicator for his fees. This reduction is said to arise because Bennett would have recovered this sum as an output when accounting for VAT during its normal VAT accounting. Thus, it is contended, the sum would, in effect, be recovered twice.

11. Since this point was not taken previously, it is now too late to raise it as a defence at this stage. Furthermore, if the point is a good one, Bennett will have to account to the Inland Revenue for this sum since it would represent a payment to it of VAT and any receipt of VAT, subject to one and only one set off from it VAT liability as an output, must be accounted for by means of a direct payment to the IR of the sum received. Thus, Bennett would not end up with a windfall double recovery payment.

12. I therefore confirm my original order.

Order

13. The order submitted to the court may now be drawn up and entered in the terms contained in the draft order. MSP is directed to email a further copy of this order to my clerk who will arrange for it to be printed down, entered and returned to the parties as soon as it is received.

Ms Jessica Stephens (instructed by Birkett Long, Ocean House, Waterloo Lane, Chelmsford, Essex, CM1 1BD) for the Claimant
Mr Michael Taylor (instructed by Dickinson Dees, St Ann's Wharf, 112 Quayside, Newcastle upon Tyne, NE99 1SB) for the Defendant