

Notes on the TCC decision in Fitzpatrick Contractors v Tyco Fire & Integrated Solutions on 20 February 2009.

Fitzpatrick Contractors v Tyco Fire & Integrated Solutions, which was decided by Mr Justice Coulson in the Technology & Construction Court on 13 June 2008 concerned preliminary issues over the nature, scope and construction of the terms of a sub-contract.

Fitzpatrick had been engaged by Transport for London to carry out the refurbishment of part of the Blackwell Tunnel in London. Fitzpatrick sub-contracted the M&E works to Tyco. The works were completed without the contract being signed. The court, held that a basic agreement had been reached which had been raised by subsequent discussions. Tyco had argued that these subsequent discussions should be disregarded because the agreement was never signed. After an analysis of the correspondence and evidence relating to discussions and meetings, the court rejected Tyco's argument.

Since then, the matter has been before Mr Justice Coulson again, this time in relation to costs. The substance of the case on which we commented in our Legal Review remains unaltered.

Fitzpatrick claimed that it was entitled to costs on an indemnity basis. Under the Civil Procedure Rules, once a costs order has been made, there are two bases upon which a court may assess the amount of costs: (a) the standard basis, where almost invariably the successful party will receive less than the costs they had to pay their solicitor; and (b) the indemnity basis, where a party is more likely to recover a sum which reflects the actual costs in the proceedings.

Fitzpatrick had made a Part 36 offer, which was accepted by Tyco, but long after the period of acceptance of the offer had lapsed, and just three months before the adjourned trial was due to commence. A Part 36 offer should cause the other party to consider the strength of their case, whether they are prepared to settle, or whether they are prepared to risk a costs penalty if the matter goes to hearing and they do not ultimately do better than the terms offered. (If a party does not accept the Part 36 offer or fails to beat the Part 36 offer at the hearing, the court is likely to order that they make a considerably larger contribution towards legal costs than they would otherwise have had to make.)

Under the rules, a claimant can seek indemnity costs either where there is a presumption that such costs will apply (as a consequence of the failure to beat the Part 36 offer at the hearing) or if the claimant can demonstrate that the defendant's conduct was unreasonable.

Here, Fitzpatrick could not rely on the presumption in rule 36 because there was no trial, only a hearing on preliminary issues. On the whole, there had been no conduct on the part of Tyco which the judge considered would justify an order for indemnity costs. The mere fact that Tyco accepted the Part 36 offer well outside the period of acceptance did not provide grounds for unreasonable conduct.

The court's comments on costs in this case serve as a reminder that the rules should be interpreted in a way that encourages parties to continue to re-evaluate offers. Even if a defendant had originally concluded that it was not going to accept an offer, it should always be prepared to change its mind.

The late acceptance of Part 36 offers could expose a party to higher than usual awards of interest however. In this case, Tyco took nearly a year to conclude that the offer should be accepted. During that period, Fitzpatrick incurred considerable further costs. The judge came to the view that the delayed acceptance (whilst not sufficient to warrant an order for indemnity costs), caused Fitzpatrick to be out of pocket. Interest was awarded at 1% above base rates in respect of the period after the period of acceptance had lapsed.

Finally in its application for costs, Fitzpatrick sought an interim payment in respect of costs. The judge decided that Fitzpatrick was entitled to this.