

SALUTARY LESSONS

Costain Ltd v Charles Haswell & Partners Ltd [2009] EWHC 2350 (TCC)

20 October 2009

Summary

Costain is the TCC's latest professional negligence decision. The judgment offers salutary lessons for consultants and their legal advisors and demonstrates the court's willingness to punish unreasonable conduct through costs orders.

The TCC found the defendant ("Haswell"), an engineering consultant, liable for failing to exercise reasonable skill and care when proposing, and later re-visiting, pre-tender foundation designs. However, it was a Pyrrhic victory for the claimant ("Costain") as the amount of damages awarded (£168,478.51) was only a fraction of what had been claimed (£3.5m) and Costain was heavily penalised on costs, recovering only 38.75% (or approximately £620,000) of its total estimated costs (£1.6m). As a result, Costain suffered a net loss from bringing the claim.

In summary, *Costain*:

- (a) is a reminder that consultants should avoid or carefully draft **strict obligation** clauses.
- (b) highlights a lack of proper resourcing and supervision as the root cause of the **negligence**.
- (c) says that **delay** must be calculated up to the date the entire project was completed.
- (d) illustrates the dangers, for claimants, of making an **exaggerated claim**.
- (e) illustrates the dangers, for defendants, of not making a **Part 36 offer**.
- (f) shows the court's willingness to make modified costs orders taking account of the **parties' conduct**; and
- (g) is an example of a **lack of cost control**: such that the costs incurred by the parties far exceeded the amount recovered.

The most interesting aspect of the judgment is on costs. Costain was penalised for making an exaggerated claim, raising and pursuing unreasonable points and for the total failure of its prolongation claim (partly because it was conceptually flawed and partly through a lack of evidence). Haswell did not escape criticism either. It was penalised for failing to make a Part 36 offer in response to Costain's settlement offers, however unrealistic those offers were. This is a continuation of the approach adopted by the TCC in *Multiplex v Cleveland Bridge*¹.

Background facts

Costain engaged Haswell to provide specialist civil engineering advice in relation to their tender to design and build a sludge treatment and water pumping station in Lancashire for United Utilities Water Ltd (employer). Costain was engaged from the pre-tender stage to advise on the design of suitable foundations for various buildings that formed part of the project. The case concerned two of those buildings.

¹ (2008) EWHC 2280

The Employer's Requirements included a narrow settlement tolerance of 25mm for the building foundations.

Pre-tender Haswell advised that conventional foundations could be used for the two relevant buildings provided the ground under them was pre-loaded in order to minimise any settlement ("Original Design"). Pre-loading minimises the amount of soil settlement that occurs after a structure is built. It involves covering the site with soil for a specified period so that the weight of the soil causes the earth beneath to compress.

Post-tender, Haswell revised the Original Design - saying that piled foundations should instead be used instead. By that time, soil had already been placed on the site to pre-load it in accordance with the Original Design. Costain claimed for the additional costs and delays arising from this design change.

Strict obligations

In the consultancy agreement, Haswell warranted that:

"7.2 *[It] shall exercise all reasonable professional skill, care and diligence.*"

"7.4 *Any part of the works designed pursuant to this Agreement if constructed in accordance with such design, shall meet the requirements described in the Specification or reasonably to be inferred from the Tender Documents or the Contract or the written requirements of Costain and designed in accordance with good up to date engineering practice and with all applicable laws, by laws, codes or mandatory regulations and in all respects with the requirements of the Contract.*"

Costain argued that clause 7.4 imposed a strict liability obligation and that the Original Design fell within, and was in breach of, that obligation.

The court found that the obligation under clause 7.4 was one of strict liability - to ensure that, if any part of the works was constructed in accordance with Haswell's design, that part would comply with, *inter alia*, the employer's requirements. Clause 7.4 plainly added something different to clause 7.2, otherwise it would not have been needed. The judge found nothing wrong, in principle, with a professional giving express warranties, which impose strict liability or a performance obligation such as that the finished building will be reasonably fit for a specified purpose.

The Original Design did not, however, fall under clause 7.4 because clause 7.4 applied only to the permanent works. That is: it imposed strict liability for the works that were constructed and handed over to the employer. It did not apply to an earlier pre-tender design that was aborted.

Haswell argued that the obligation under clause 7.4 was subject to clause 7.2 so that Haswell would only be liable if they did not use reasonable skill and care. This argument failed. Consultants and their legal advisers are already alive to the dangers of strict obligations in relation to the performance of professional services and this case demonstrates that arguments by clients' lawyers that such obligations are all 'subject to reasonable skill and care' are not correct unless the individual obligation itself is so qualified. Where such obligations cannot be avoided, great care must be taken when drafting to clearly define their scope. The judge did not have to address the point that the interpretation of clause 7.4 was such as to impose a warranty for fitness for purpose, which would, had Costain been successful, have taken many consultants outside their professional indemnity insurance.

Negligence

Haswell was found to have breached its duty of care:

(a) Pre-tender – by recommending the Original Design; and

- (b) Post-Tender – by failing to realise the inadequacy of the Original Design immediately upon seeing the results of a post-tender site investigation report and thus failing to advise the switch to piled foundations at an earlier date. The results suggested that ground conditions were even less favourable than those indicated in the pre-tender data.

The detailed technical reasons for the negligence are case-specific and beyond the scope of this note. However, Fernyhough J was particularly critical of the lack of supervision and the lack of personnel in relation to the Original Design, which he described as a “*debacle*”. He speculated that the negligence would not have occurred if senior personnel had properly overseen the Original Design.

Instead, a single engineer had been tasked with making pre-tender recommendations on the foundations of at least 18 structures, including the two relevant buildings. He had 14 years experience as a geotechnical engineer, but had not previously been involved in the design of a ground treatment scheme. It appears that he worked largely on his own and without consulting more experienced engineers. The Judge commented that:

“... he fell into error ... because he attempted to do something that he had never done before ... without any significant assistance from more senior colleagues with greater experience of such works. In my judgment Haswell is also at fault in placing the whole responsibility for this design upon [him] without taking the steps to supervise his work or even to check it before it was put into practice.”

These comments should serve as a warning to consultants who may be tempted to use staff who do not have the necessary experience and/or supervision. A client may consider specifying in professional appointments which key personnel it wants to carry out the services, but ultimate responsibility rests with the consultant.

Delay and Quantum

Costain claimed 12 weeks, 4 days critical delay. However, the basis on which this had been calculated was flawed for the following main reasons.

- (a) Costain wrongly calculated delay up to the date when the foundations were finished and the buildings upon them had been built, rather than when the entire project was completed. This meant there was no allowance for any subsequent events that may have reduced the project delay. This approach might cause programmers some discomfort.
- (b) Costain claimed delay for winter working, which was wholly theoretical and completely unsupported.

Following these comments, the parties subsequently agreed that Haswell’s negligence caused a localised delay of eight weeks to the two buildings. However, for the reasons given below, Costain recovered no damages for prolongation.

Costain originally claimed a little over £3.5m. This was reduced to about £1.8m by the start of trial. In the end, the court awarded only £163,478.51 for the cost of piling and other minor direct losses. The remainder was eliminated for, variously:

- (a) Insufficient evidence that particular losses had been incurred or were caused by Haswell’s negligent acts. For example, there was no evidence that certain cost items would have been added to Costain’s tender had Haswell proposed piling pre-tender. In the absence of such evidence it could not be said that Costain had suffered those particular losses.
- (b) Reimbursement by the employer.
- (c) Overstating losses.

- (d) Valuing losses on the wrong basis. For example: (i) the amount recoverable for piling is the amount Costain would have allowed in its tender, not the actual cost incurred; and (ii) Costain was wrong to claim total site overheads. The court criticised it for assuming that all of the overheads for the project could be apportioned to the delay to the two buildings. Costain then suffered the difficulty of not being able, evidentially, to prove the local prolongation losses.

The consequences of such a low recovery were reflected in the costs order.

Interest and Costs

The court awarded interest on the damages, but Costain was penalised for unreasonable delays in pursuing the claim. Interest was computed over a four year period, of which the amount recoverable was reduced by 50% for twelve of those months to reflect the delays.

Costain was also penalised on costs, despite being the 'successful' party. Following *McGlinn*² and *Multiplex v Cleveland Bridge*³, the court initially awarded Costain 65% of its costs and Haswell 35% based on their relative success in the litigation.

Those percentages were then reduced by 10% against Costain and 20% against Haswell, so that they were each entitled to, respectively, 55% and 15% of their costs. The court then netted these off with the result that Costain is entitled to about £620,000, which represents 38.75% of its estimated total costs.⁴ This means Costain will suffer a net loss of about £800,000 from bringing the claim.

The further reductions reflected the parties' conduct during the litigation. In particular:

- (a) For Costain - its exaggerated claim, its raising and pursuing of an unreasonable claim (prolongation for winter working), the total failure of its prolongation claim and the fact that it lost seven of its eleven heads of claim and recovered less than 5% of the amount originally pleaded.
- (b) For Haswell – its failure to make a Part 36 offer.

The court's comments on the absence of a Part 36 offer by Haswell are particularly interesting. Haswell argued that, because of a lack of particulars and evidence by Costain, it could not assess the true value of the claim until trial, and this made a Part 36 offer impossible. Haswell did make a 'drop hands' offer (ie each party to walk away and bear their own costs) shortly before trial and, interestingly, Costain would have been in a better position financially if it had accepted that offer. However, these arguments were not accepted by the court. Fernyhough J noted that Haswell rejected Costain's offers (of £1.89m inclusive, £1.79 inclusive and £1.15 plus costs) without making a counter offer, which he considered to be unreasonable conduct. He concluded that there were sufficient grounds for Haswell protecting itself by a Part 36 offer and, even if Haswell was convinced that it would succeed, "*that [was] not a good reason for failing to make even a modest offer ... since, as everyone experienced in this field knows, litigation is an unpredictable pursuit*".

The key points on costs are:

- (a) Avoid unnecessary delays when pursuing a claim, otherwise the claimant may be penalised on interest.
- (b) The strategy of pursuing an inflated claim can be counter-productive and may lead to cost penalties for claimants even if they are the successful party. A realistic claim is much more likely to result in a settlement.

² (2007) EWHC 698

³ (2008) EWHC 2280

⁴ Costain's estimated costs were £1.6m, of which 55% is £880,000. Haswell's estimated costs were £1.3m, of which 20% is £260,000. £880,000 - £195,000 = £620,000.

- (c) Unless there are compelling reasons for not doing so, a defendant should make a Part 36 offer, especially if the claimant has made an offer (however unrealistic their offer might have been). If the claim is exaggerated or impossible to value, even a nominal Part 36 offer will be better than none when costs are later decided.
- (d) Great care should be taken to make sure that costs do not escalate to the point where the litigation becomes uneconomic. This is especially important in TCC cases, which typically involve technical issues, large volumes of documents and heavy expert input. In *Costain* the parties appear to have lost sight of this with the consequence that they both incurred considerable net losses.

If you have any further queries in relation to this case please contact Nick Gillies on 020 7420 8713 or n.gillies@beale-law.com.