JUDGMENT : His Honour Judge Thornton QC: TCC. 17th July 2006

Introduction

1. This judgment is concerned with the costs of the action and follows the handing down hearing at which the parties made detailed and very different submissions as to how I should deal with the costs of both the claim and the counterclaim. The parties also made submissions as to the details of my findings as to two of the items in dispute which I am able to deal with since the order was not perfected when these submissions were made.

2. The effect of my judgment was as follows:

   (1) As to Monavon's claims, I found in its favour that there was no ceiling in relation to the sum that Monavon could charge for undertaking the work that was the subject of its claim and also in its favour in relation to some of the small items of claim still in dispute. The result was that Monavon was entitled, subject to abatement, set-off and cross-claim, to a sum of just under £100,000. Monavon's net claims had totaled about £116,000.

   (2) As to the Davenports' claims, I found in their favour that they were entitled to just over £100,000 as damages representing the cost of repair of the many items of defective and incomplete work, subject also to Monavon's set-offs and cross-claims.

   (3) The principle issues, in terms of their monetary consequences, were the issues arising from both parties' rival contentions that Monavon was, or was not, liable for any work carried out by the previous contractors or for any surviving defects or deficiencies in that work once Monavon had carried out its work, that there was, or was not, a cost ceiling or limit on Monavon's potential recovery, that the Davenports' principle defects claim relating to dampness in the basement was, or was not, caused by any breach by Monavon of its contractual obligations and that most of the remaining items of the Davenports' claims were, or were not, misconceived, subject to abatement or set off or greatly exaggerated.

   (4) All these issues were closely inter-related. This was inevitable given the relationship between the claims based on the cost of the work and the cross-claims based on defects and deficiencies in that work which were, both in law and in fact, subject to defences of abatement and set-off in each direction.

   (5) The total sum claim was about £115,000 and that being cross-claimed was originally about £230,000 but was increased by amendment just before the trial to about £365,000. Although these sums were, on paper, significantly different, they were closely inter-dependent and it would not have been possible to make a realistic offer of settlement or a payment into court that related solely to either the claim or the cross-claim, given the existence of the alleged cap and of the Davenports' entitlement to abate

   (6) The end result of the litigation was that the Davenports ended up as succeeding by the marginal result of a judgment in their favour in a sum of just under £5,000.

3. The action was hard fought but, following my case management directions, conducted with commendable speed over two days with no oral opening or closing submissions. Much of the second day was spent in a prolonged site inspection with both experts followed by a continuation and conclusion of the hearing around the Davenports' dining room table. This enabled the trial involving a large number of disputed items of alleged defects to be contained within that very short timescale. However, in deciding on the costs consequences of that trial, I must apply the principles of CPR 44.3 which define the manner in which I must exercise my discretion as to the costs of both sides in relation to this action and the circumstances I must take into account when doing so.

4. Clearly the starting point is that hard fought litigation has resulted in a victory by the narrowest of margins by one party in a sum which is well within the jurisdiction of the small claims' court and way below the usual threshold for High Court litigation.

5. The relevant principles are set out in CPR 44.3. I have a discretion as to whether costs are payable by one party to another and, in exercising that discretion, I must have regard to all the circumstances including the conduct of the parties; whether a party has succeeded on part of the case that party was presenting; and any payment into court or admissible offer to settle. The relevant conduct referred to includes the parties' conduct before as well as during the proceedings including the extent to which each party followed the TCC pre-action protocol; the reasonableness of each party in raising, pursuing or contesting particular allegations or issues; the manner in which each party pursued or defended the claim or cross-claim or any particular allegation or issue; and whether a claimant has succeeded in that party's claim in whole or in part has exaggerated the claim being presented.

6. The case is one, as both sides accept, in which I cannot and should not distinguish between, and consider separately, the costs of the claim and the cross-claim. Thus, the obvious starting point, under the CPR, is that neither side has won nor lost. There were no payments into court or relevant admissible offers. It was impossible to foretell precisely what net sum would be recovered and by whom and the overall recovery was very small.

Parties' Contentions

(1) **The Davenports**

7. The Davenports' principle contention was that they should have the costs of the action, to include both the claim and the cross-claim, since they were the successful party. Their contention was that Monavon had brought a claim that had wholly failed and has ended up as the paying party following my judgment on liability and quantum.

8. In support of this analysis, the Davenports point to their relative success in recovering approximately £100,000 on their claim and in reducing Monavon's claim by £21,000 from a finally claimed figure of about £115,000. Their conduct had been reasonable throughout, both in the pre-litigation and post-litigation stages of the dispute, it had

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been reasonable to defend and pursue High Court litigation given the sums at stake and the nature and range of the disputes and the desirability of using TCC procedures to contest them and there was, in consequence, no good reason for not awarding them their costs.

(2) Monavon

9. Monavon contended that it should have its costs up to 6 February 2006, or up to a reasonable time thereafter, and should not pay any of the Davenports' costs up to the same date and there should be no order as to costs thereafter. The critical date was the date on which the Davenports obtained permission to amend the schedule setting out the detail of their defects claims by adding a further £131,404 by way of further or amended claims to the schedule. This raised the total sum claimed to £365,159.20.

10. In support of these contentions, Monavon relied on what it perceived to be the Davenports' unreasonable conduct. In particular, the Davenports succeeded, as Monavon saw the Davenports' position, only because of the late amendment to add the new claim relating to the dampness in the basement. But for that amendment, the Davenports would have lost overall in the sum of £47,500. In addition, the Davenports conduct was criticised in greatly exaggerating their claims overall, by the progressive and unreasonable addition to their claims, by contending and pursuing their contention, which failed, that the value of the work was subject to a cap of £100,000, by making no offer to settle and by their delay in dealing with the claim before and during the litigation. This overall unreasonable conduct greatly added to Monavon's costs in pursuing its claim and in defending the cross-claims.

(3) **Indemnity Costs**

11. I should also record that each party claimed that the costs it contended it should recover from the other should be assessed on an indemnity basis. The Davenports pointed to Monavon's alleged unreasonable behaviour in rejecting early offers to settle; in starting the action before attempting to comply with the pre-action protocol; and in rejecting their reasonable offer to submit to an ad hoc adjudication to resolve all disputes. Monavon also declined their suggestion that both parties should forsake appointing separate experts in favour of a jointly appointed expert and, so the Davenports alleged, increased the costs of the litigation by declining to make appropriate and cost-saving concessions before trial.

12. Monavon retorted by relying on the Davenports' unreasonable conduct, as it saw the situation, in failing to identify the nature, range or cost of their cross-claim at the outset, by the progressive and exaggerated nature of the additions to this cross-claim culminating in the late amendment permitted on 6 February 2006, by the costly and unsuccessful pursuit of the issue concerning a cap on the value of the work and by failing to make any significant offer to settle, payment into court or attempt to compromise before trial.

Parties' Conduct

13. The reasonableness of each party's conduct is clearly challenged by the opposing party and I will first examine each party's conduct under the several heads raised during the costs argument. These heads are, broadly, pre-action conduct; delay and late development of their respective cases; disinclination to negotiate, compromise or offer to settle; exaggerated or unreasonable pursuit of issues and claims; unreasonable incurring of costs; and conduct overall and in the round.

(1) Pre-action Conduct

14. The background to the dispute must be taken into account. On the Davenports' side, the work involved considerable expenditure to make good the disastrous effects of the failed previous contract. The refurbishment work was being carried out to a fine Town House in a prestigious part of London to a very high standard so as to provide the Davenports with their dreamed for family house. Time, cost, quality standards of finish, reliability and trouble-free working were all expected from Monavon and, as Mr Davenport saw it, all were promised by Mr McGowan. On Monavon's side, the contract was taken on as a favour to the Davenports and was apparently one of little difficulty. The labour would be that previously used by the first contractor since they already had acquired a detailed knowledge of the work and the working environment. The work would be well paid, since it would all be paid for on a cost plus basis and it would not take very long to complete.

15. Unfortunately, the prospect of a harmonious completion of the contract was doomed from the start. The work was unusually poorly defined with no written contract to speak of. There was no definition of the work, no way of defining or limiting cost, no professional supervision, many hidden and unforeseen defects requiring remedy and poor and inexperienced workmen with little command of English and inadequate training and experience in many of the trades they were working in. Furthermore, Mr McGowan's experience and management skills were not sufficient to cope with the difficulties that were encountered.

16. When the contract came to an end, the parties were deeply entrenched and at complete loggerheads. Each side felt that the other was behaving completely unreasonably and both sides knew that the other had significant claims outstanding. On the Davenports' side, they knew that Monavon was claiming well in excess of £100,000 in circumstances in which they and Monavon knew that they were contending that nothing more was due. Monavon knew that there were many defects in the work and that many more defects were being alleged. Monavon also knew that its contention that it was not in any way responsible for the major defects involving the dampness and the electrical system was disputed by the Davenports but that it was clear, almost from the moment that Monavon ceased work that the Davenports had significant, and financially large, claims involving these areas of the work, albeit that none of their claims had been itemised, particularised or costed. Monavon also knew, or should have

known, that part of its claims related to remedial or snagging work which Mr McGowan had assured Mrs Davenport would not be charged for.

17. Between October 2004 and February 2005, little was done to pursue either claim or cross-claim. However, Mr Davenport and Mr McGowan met in November 2004 to discuss the dispute which was obviously simmering. No common ground was established but Mr Davenport suggested that the parties should submit their respective disputes to adjudication and Mr McGowan appeared to be amenable to that suggestion without committing Monavon in any way. It has to be remembered that although the contract was a construction contract, the disputes were not subject to the statutory scheme for adjudication since the work involved work to an occupied dwelling house lived in by one of the parties to the construction contract and, in any case, some of the significant terms of that contract were not in writing. Furthermore, any ad hoc adjudication would, unless the contrary was expressly agreed in advance, not be final since either party would be able to litigate any part of the dispute or any finding of the adjudicator.

18. The adjudication proposal was subsequently rejected by Monavon through its recently appointed solicitors, essentially for the reasons summarised above. The Davenports, through their recently appointed solicitors, attempted to resurrect the adjudication proposal by suggesting that the adjudication could be final and binding but this was not acceptable to Monavon. One reason for this was that, at that stage, the Davenports had not provided any list of the defects they were complaining of nor any indication of the size or nature of their cross-claim.

19. The next step involved Monavon's solicitors preparing and serving a pre-action protocol letter invoking the TCC pre-action protocol. This was sent to the Davenport's solicitors by a letter dated 1 April 2005. This was responded to by the Davenport's solicitors in a letter dated 18 May 2005. The Davenports' letter raised, along with many other matters, their complaints about the electrical system, the dampness and damproofing arrangements in the basement and a cross-claim which, although not fully quantified, was obviously considerably larger than the size of Monavon's claims.

20. A pre-action protocol meeting then took some weeks to be arranged. It is clear that the principal reason for this delay was the fact that Mrs Davenport, who had most of the knowledge and detail needed for any discussion of the rival claims, was in an advanced state of her pregnancy and by the subsequent birth of her second child. In the circumstances, any apparent delay on the part of the Davenports in this period was not borne out and was wholly justified and reasonable.

21. Monavon did not wait until the meeting had taken place before issuing proceedings in October 2005 but the parties then held a pre-action protocol meeting at an early stage of the litigation which failed to produce any narrowing of issues or an overall or partial compromise of the disputes.

22. In the light of that history, I do not regard either party as having behaved unreasonably or in a manner that should lead to any stigmatisation of costs. It is the case that both parties had, but failed to make use of, other means of narrowing or eliminating their differences in both proposed adjudication proceedings and through the medium of the pre-action protocol process as well as in less formal meetings between them and in discussions between solicitors. With hindsight, each party could have done more to define and crystallise their claims and disputes and to seek to resolve them through less formal means. However, these potential criticisms are mutual and, on analysis, are not justified as criticisms of either party.

(2) Delay and Late Development of Case

23. The principal complaint under this head was that the Davenports did not provide any detail of their principal complaints until a late stage of the dispute. This complaint related to the fact that no schedule or particulars of the defects was provided until the Davenports served their defence save for generalised suggestions that their cross-claims exceeded the claim being advanced by Monavon. Even when the defence was served, there was no detail provided of the principle defect alleged relating to the basement dampness. This claim only appeared in the amendments allowed on 6 February 2006.

24. I accept that the Davenports were slow in developing the details of their cross-claim and that their schedule of complaints was amended at a late stage. However, all the defects were being complained about from an early stage and were clearly in play in the pre-action protocol stage of the dispute. The Davenports have had to bear the costs occasioned by the late amendment but its detail came, or should have come, as no surprise to Monavon and could not reasonably have affected its attitude to the litigation. Thus, it was not prejudiced in its conduct of its claim or its defence and the inability to compromise the dispute before trial was not affected by the lateness of the amendment.

(3) Negotiation, Compromise and Offer to Settle

25. It would appear that Mr Davenport made one or more informal offers to Mr McGowan to settle the dispute in November 2004 which were rejected and that Monavon made an offer in writing to settle on 7 March 2006 in relation to the counterclaim which was greatly exceeded in the result. These offers do not suggest that either party was acting wholly unreasonably. Moreover, both parties involved themselves with commendable zeal in a protracted pre-action protocol procedure which failed to resolve their differences. There is nothing about the conduct of either party which can be characterised by a suggestion of unreasonableness. The plain fact was that their differences were too entrenched to be resolved by out-of-court settlement attempts despite significant attempts to resolve them in this way.

(4) Exaggerated or Unreasonable Pursuit of Issues and Claims

26. It might appear at first blush that the Davenports greatly exaggerated their claims since they ultimately claimed in excess of £350,000 but only recovered £100,000. However, their claims were spread through many items and the great majority of those claims succeeded as to liability. The excessive costings related largely to the dampness claim which nonetheless succeeded in a significant extent. The excessive quantification did not, in this dispute, affect the attempts to settle, the cost of the litigation or the time at trial.

27. The Davenports did pursue the unfounded suggestion that there was a cap on their liability to pay Monavon. However, although they lost on this issue, it did not significantly affect the cost of, or any attempt to settle, the litigation. This was because Monavon's monetary claim was subject to both abatement and set-off in relation to the defects claims. In consequence, Monavon's conduct of its case was not significantly affected by this issue being pursued and it did not take any significant time at trial to be dealt with.

28. If follows that this head of complaint did not amount to unreasonable conduct by either party.

(5) Unreasonable Incurring of Costs

29. Monavon complained that it had had to incur significant additional costs in its expert having to deal with the Davenports' developing claims and the Davenports complained that Monavon refused their suggestion of a jointly appointed expert, thereby necessitating each party having to appoint a separate expert.

30. It is clear that this dispute could not have been satisfactorily dealt with by one expert since the framework within which a single jointly appointed expert would need to operate within was not sufficiently clearly defined to allow such an expert to be satisfactorily appointed. Indeed, once appointed, the two experts worked with commendable speed, efficiency and professionalism to define and confine the disputes such that all issues involving the defects and all relevant evidence was set out in a user-friendly schedule from which the entire trial was conducted.

31. In summary, instead of there being complaints of unreasonable conduct, both parties acted in a way that greatly reduced the costs and the conduct of both experts was, as I find, a credit to experts giving evidence and to the giving of expert evidence under TCC procedures and CPR 35.

(6) Overall Conduct

24. I find that there is nothing about the conduct of either party which should give rise to any adverse cost order or cost consequences.

Conclusion – Costs

25. I approach my costs order decision on the basis that the result of this litigation was the equivalent of what, in litigation vernacular, is sometimes called "a drop hands" result. That means that both parties were left having won and lost in equal measure. It is the case that the Davenports' only succeeded in monetary terms in about 30% of their claim on paper. However, they did succeed on two principle issues: (i) in relation to the terms and nature of the contract and (ii) in relation to their substantial success, on both the number of items and in relation to the principle defects item concerning the dampness in the basement. Monavon also succeeded in relation to two principle items: (i) as to the suggested cap on its claim and (ii) in reducing the defects claim substantially. I regard Monavon's success in its financial claim and the Davenports' success in their defects claims as canceling each other out.

26. On this basis, each party has been involved in a "score draw" and neither party made a sealed offer or payment into court. Given my findings as to each side's relative lack of culpability in relation to their respective conduct before and during the litigation, it follows that the fair and proportionate order as to costs in a case in which a very small, but marginal, sum was awarded to one party and where an issues or claim-based costs order is inappropriate is that each side should pay its or their own costs and should not pay any of the costs of the other party, save for such costs that have already been ordered to be paid in earlier procedural costs orders. Such procedural costs orders should stand.

Replacement Carpets and Damp Proofing Issues

27. I have been asked to determine whether the sums awarded for replacement carpets and damp proofing. It is clear from the post-judgment submissions of Monavon that the experts' agreement as to the quantum of these items (items 21 and 40 – 46) was to be taken to be VAT inclusive and that these agreed figures were adopted by both parties in their closing submissions.

28. In consequence, I confirm that the appropriate figures for these items are: item 21: £4,039.00; items 40 – 46: £46,000.

Overall Conclusion

29. The parties are to submit an order, whose wording has been agreed, for entry to give effect to this judgment and to any outstanding matter from the first liability judgment not yet enshrined in an order. The order is to be submitted for entry by post by 24 July 2006.

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