“Play nicely, children”

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Litigation is, by its very nature, an adversarial process. But as the court has made clear in the case of *Simon Gotch & Susan Linda Gotch v Enelco Limited*[1], litigants should also co-operate, to ensure the swift and cost-effective resolution of their disputes.

So said Mr Justice Edwards-Stuart, in a judgment handed down on 3 July 2015, in which he gave guidance on the appropriate conduct in the Technology and Construction Court, particularly with regard to ensuring that litigation is carried out in a proportionate manner, so as to keep costs to a minimum.

At a case management conference, the court was required to determine the appropriate costs order on a Part 8 claim.

In this case, the Claimants had engaged the Defendant to construct two residential properties. A dispute arose between the parties and the Defendant threatened to refer the matter to arbitration. The Claimants objected, on the basis that the arbitration clause in the contract had been wholly or partially deleted. The Claimants also alleged that the occupier exemption clause applied, which made adjudication inappropriate.

The Defendant agreed to postpone any reference to adjudication but the Claimants issued a Part 8 claim, seeking a declaration that the Defendant had no right to refer the matter to adjudication and sought directions from the Court to that effect. The Court’s response to the application was to order the parties to agree directions between them in the normal way. The Claimants refused to agree directions with the Defendant and, instead, insisted that the Court determine the issue with regard to ensuring that the Defendant had no right to refer the matter to adjudication.

The Court’s response was severe. The Court held that no useful purpose was served by the pursuit of the Claimants’ application. It was clear that the Defendant had no current intention to refer the dispute to arbitration or adjudication and therefore the question as to whether the contract conferred a right to do so was academic. The Court ordered that the Claimants’ application should be stayed and that proceedings should continue as if they had been started under Part 7. The Defendant could then pursue the determination of the dispute and its claim for damages by way of a counterclaim.

The Court was keen to emphasise that parties and their solicitors could no longer conduct litigation in a manner which did not keep the proportionality of the costs being incurred at the forefront of their minds at all times. It was not acceptable for a party to pursue an application that had no real impact on the issues that were central to the dispute. The Court agreed that English Law was an

Any comments or queries?

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1. [2015] QBD (TCC).

adversarial process that went to the issues in the case, but not to every aspect of the procedure. Mr Justice Edwards-Stuart made the following point, which is useful to keep in mind:

"Parties in the TCC are expected to conduct litigation in a manner that is expeditious and economical. Bringing the right issues to trial in the most economic fashion, and taking steps to ensure that costs are kept at a level that is proportionate to what is at stake."

Furthermore, it is unacceptable for parties to take issue with every single point by having "procedural squabbles". In order to adhere to the overriding objective, parties must create a "culture of co-operative conduct".

The conclusion of the Court was that the Claimants' application for a determination on the matter of adjudication was wholly unnecessary. It would have been more appropriate for the Claimants to seek an undertaking from the Defendant that they would not refer the matter to adjudication or arbitration without giving the Claimants notice. On this basis, the Claimants' conduct was deemed to be inexcusable and they were ordered to pay the Defendant's costs of the action between 17 April, when the Defendant agreed to postpone any reference to adjudication, and 21 May, when the court ordered the parties to agree directions, along with 50% of the Defendant's costs of attending the case management conference.

What are the implications of this case?

- It is clear that the Courts will not tolerate parties trying to score points against the other by taking unnecessary procedural points.
- Parties must always have the overriding objective at the forefront of their minds and litigation must be conducted in the most economical way possible.
- Costs must be proportionate and kept to the reasonable minimum. Whilst this is an opaque concept in practice, it means that unnecessary applications that do not go to the issues in the case will not be tolerated, particularly if there is a more cost-effective and reasonable method of resolving the issue in question.

Moving forward, it appears that the Courts would like to see parties behaving in a more co-operative manner, where disputes are resolved expeditiously and economically. The old tactics of a "war of attrition" are no longer acceptable.

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