



“Ready to walk the Reimbursement Maze?”

Recoverable or not recoverable - that is the question?

RICHARD BAILEY – PARTNER, GOODMAN DERRICK EXPLORES THE NUANCES OF RECOVERABLE CONSULTANTS’ COSTS AS THEY APPLY TO ADJUDICATION AND ANY ENFORCEMENT ACTIVITY THAT MAY FOLLOW.

One of the biggest issues in adjudication is costs, as they are generally considered to be irrecoverable. Then, when you have got to enforce a decision, you need to brief a solicitor and barrister to pursue the claim at great cost, no matter how simple and straight forward the claim may be.

Following a number of recent court cases this position is changing. In *Octoesse LLP v Trak Special Projects Limited* [2016] EWCH 3180, the technology and construction court (TCC) held that claims consultants costs could, in limited circumstances, be recovered as a disbursement. In the case of *Lulu Construction Ltd v Mulalley & Co Ltd* [2016] EWHC 1852, the TCC determined that debt recovery costs under

section 5A(2A) of the Late Payment of Commercial Debts (Interest) Act 1998, as amended by the Late Payment of Commercial Debts (Interest) Regulations 2013, may be recoverable as part of an adjudicator's decision in limited circumstances.

In this article we will primarily focus on the Octoesse case.

Following a successful adjudication in favour of Trak Special Projects Limited ("Trak"), in which the adjudicator decided Octoesse LLP's ("Octoesse") pay less notice, issued under the terms of the JCT Intermediate Building Contract 2011 (IC 1011), was invalid, Octoesse commenced Part 8 proceedings seeking declarations that the adjudicator's award was unenforceable. Mrs Justice Jefford ("the judge") gave judgment in favour of Trak and ordered Octoesse to pay the sums awarded to Trak in the adjudication. Attention then turned to the question of costs.

Trak asked for its costs to be summarily assessed, including the costs of its claims consultant ("Wellesley"). The reason being that counsel had been instructed by Wellesley, on a direct access basis, and Wellesley had conducted the adjudication on behalf of Trak. Hence, as well as counsel's costs, Trak also sought to recover the consultant's costs in connection with considering the claim and evidence, preparing the defence and a witness statement, instructing counsel, liaising with the court, and attendance at court.

Although Octoesse took no issue with counsel's costs, they submitted that the consultant's costs, Wellesley's, were not recoverable under CPR 46.5 (3), as Octoesse were a litigant in person.

Relying on the Court of Appeal's decision in *Agassi v Robinson* (Inspector of Taxes) (No.2) [2005] EWCA Civ 1507, Octoesse submitted that Wellesley's costs were not recoverable as they were neither work done by the litigant in person, nor disbursements which would have been allowed if made by a legal representative.

The judge said that the costs were recoverable as a disbursement. Coming to this decision, the judge noted that it was in this area of 'specialist assistance' where there was, "a difficult dividing

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line between what is and is not recoverable". However, the judge was of the view that these two potentially conflicting approaches could be reconciled, "if it is recognised that, in particular circumstances a solicitor might well normally not carry out work himself but rely on a specialist, even though the work in its broad description might be 'solicitors' work'". The judge held that there is unlikely to be a 'one size fits all' in regards to disbursements; as what are regarded as normal solicitors' disbursements may vary according to the nature of the case, reflecting both differing norms in different practice areas and changes in practice.

The judge observed that there were distinct features of adjudication which, "can and should" be taken into account in considering what disbursements would be recoverable. The judge gave two reasons for this:

1. In adjudication, parties are often represented by claims consultants or other consultants like Driver Trett. If solicitors are instructed on the enforcement proceedings, particularly where they have not acted in the adjudication, it would be common practice and often necessary, to seek the assistance of the consultants who were involved in the adjudication.
2. Given the abridgement of time limits applied by the TCC in adjudication enforcement cases, it is normal and also necessary for solicitors to seek the assistance of the consultants involved in the adjudication. Because of the accelerated timetable, it would not be realistic to constrain what assistance might be required.

The judge also noted that there had been

a number of cases where the costs of claims consultants had been recovered. In particular, *NAP Anglia Ltd v Sun-Land Development Co. Ltd* [2012] EWHC 51, where Edwards-Stuart J stated that the court should not adopt a, "blanket approach" to the assessment of claims consultants' costs but instead, "they need to be looked at on an item by item basis". He therefore rejected the submission that claims consultants' costs were not recoverable in principle, but considered the relevant question to be whether those costs were reasonably incurred and reasonable in amount.

The judgment concluded that the costs incurred by claims consultants, in assisting a litigant in person, will usually be recoverable in adjudication enforcement proceedings; assuming that the same consultants have represented the party in the adjudication.

However, there was a limit to this. The consultant's costs of liaising with the court and preparing the schedule of costs were not recoverable, because the judge held this was 'solicitor's work' and that it would not require much assistance from the consultant. Furthermore, only half of the time spent instructing and liaising with counsel was recoverable on the basis that, if solicitors were instructed, they would not solely rely on consultants for this, but would carry out some of these tasks themselves.

Therefore, within limits, a consultant who acts for a client in an adjudication can also provide assistance in the enforcement and those costs may well be recoverable.

The second case, *Lulu*, has been widely touted as a confirmation that the costs of an adjudication can be recovered, however, this is not quite correct. The reality is that the *Lulu* case is far more limited, as it relates only to a contract where the Late Payment of Commercial Debts (Interest) Act applied, and then only to costs recoverable as debt recovery costs. If the Act does not apply, then section 5A(2A) does not apply. Debt recovery costs in the adjudication were defined as costs connected with an ancillary to the referred dispute, not the costs of the adjudication itself. ■