Society of Construction Law Conference in Leeds: 6/3/2020
Keynote Speech by Sir Rupert Jackson

'Winners, Losers and a Coda on Good Faith'

1. WINNERS AND LOSERS

1.1 A question which commonly arises at the end of construction (and other) arbitrations is: Who has won? Who gets costs? As recent case law has shown, this is not always an easy question to answer. Both judges and arbitrators have wrestled with the conundrum over the years. They have not always arrived at the same answers.

(i) The cases

1.2 Costs decisions reached by judges in litigation are relevant to arbitration, even though CPR Parts 36 and 44 are not embodied in arbitration law. Section 61 of the Arbitration Act 1996 and CPR rule 44.2 (2) are to broadly similar effect, but section 61 does not have grafted onto it the further encrustation of rules and sub-rules to be found in CPR Part 44. Likewise, the approach to the effect of settlement offers is broadly similar in both litigation and arbitration, but arbitrators are not bound by the myriad rules and sub-rules contained in CPR Part 36. Arbitrators have borne that deprivation with fortitude. We must bear in mind those distinctions between litigation and arbitration as we embark upon our Odyssey through the authorities.

1.3 In *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 1 Lloyd's Rep 391 at 397-8 Donaldson J gave the following guidance to arbitrators:
'The position of a 'sealed offer' in arbitration has to be considered against the background of the law relating to payments into court, but it is not necessarily the same, because the Rules of the Supreme Court[1] do not apply to arbitrations. I can see no reason in principle or practice why a 'sealed offer' should not be expressed to relate to 1934 Act interest as well as to principal. Indeed, I think it should, because, if it is accepted, the arbitrator will have no power to make an award of interest by itself …

How should an arbitrator deal with costs where there has been a 'sealed offer'? I think that he should ask himself the question: "Has the claimant achieved more by rejecting the offer and going on with the arbitration than he would have achieved if he had accepted the offer?" This is a simple question to answer, whether the offer does or does not include interest. The arbitrator knows what the claimant would have received if he had accepted the offer. He would have received that sum and could not have asked the arbitrator to award any interest. The arbitrator knows what he has in fact awarded to the claimant both by way of principal and interest. In order that like should be compared with like, the interest element must be recalculated as if the award had been made on the same date as the offer. Alternatively, interest for the period between offer and award must notionally be added to the amount of the sealed offer. But subject to that the question is easily answered.

[1] The 'Rules of the Supreme Court' were the procedural rules governing the High Court and the Court of Appeal up to April 1999.

If the Claimant in the end has achieved no more than he would have achieved by accepting the offer, the continuance of the arbitration after that date has been a waste of time and money. Prima facie, the claimant should recover his costs up to the date of the offer and should be ordered to pay the respondent's costs after that date. If he has achieved more by going on, the respondent should pay the costs throughout.

Let me stress, however, that whilst this the general rule, there is an overriding discretion …' [The judge then went on to give examples of situations where 'conduct' issues might lead to a different costs order.]

1.4 In *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161 Sir Thomas Bingham MR gave the following general guidance:

'The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?'

1.5 That passage in *Roache* has often been cited as authoritative, which indeed it is. I shall refer to it as 'the Bingham test'. The Bingham test comprises three questions. Question 1 is important, but not determinative in every case. That is because the claimant may have won on all the issues before the court but failed to beat an even more generous settlement offer. Question 2 involves comparing the result achieved by the victor with previous settlement offers made by the losing party. Question 3 is really an aid to answering question 1.

1.6 Despite its elegance and wisdom, the Bingham test does not tell us the answer in every case. What happens if the answer to both questions 2 and 3 is 'yes'? In those circumstances the answer to question 1 is unclear. We must therefore press on through the authorities in our quest for the philosophers' stone.

1.7 Following the introduction of the CPR in April 1999 there was a cluster of decisions on costs. In *Kastor Navigation v Axa Global Risks* [2004] EWCA Civ 277 the Court of Appeal proceeded on the basis that the successful party in litigation should recover its costs, subject to adjustment in respect of issues which it had lost (even if that party had been reasonable in arguing the points which it had lost). But the court should not apply the mathematical outcome of an issue by issue approach. That would not be fair to the party which had won the litigation. See the judgment of Rix LJ at [153].

1.8 *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750 was a personal injury action in which C sought £500,000 but recovered only £2,000. D had not made a Part 36 offer. The trial judge and Jackson LJ (dissenting on appeal) took the view that C should recover 50% of his costs, the discount being for the issues which C had lost. They regarded the absence of Part 36 offer as crucial. The majority of the Court of Appeal held that D was the successful party and should recover 75% of its costs. They took the view that the real claim had failed. No rational person would have pursued those proceedings to recover £2,000 (see Sir Anthony May PQBD at [21]). Tomlinson LJ, who was in the majority, observed at [44]:

'Decisions about costs are in my experience often amongst the most difficult which can confront a trial judge. This experience is borne out by the fact that this court is itself divided

so that the four judges who have so far had to consider the issue are evenly divided as to the proper order.'

1.9 *Fox v Foundation Piling* [2011] EWCA Civ 790 was another personal injury case, decided a week after *Medway*. C claimed substantial damages for spinal injury. Video evidence secretly obtained by D's insurers showed that C was able to walk normally; his general mobility was good. The final outcome was a settlement under which C received £31,702. This was better than D's previous Part 36 offer of £23,550. The judge held that D was the successful party in respect of the period after expiry of the Part 36 offer. He ordered D to pay C's costs up to the expiry of the Part 36 offer, but C to pay D's costs thereafter. The Court of Appeal reversed that decision and ordered D to pay C's costs of the entire action. At [62] to [63], with the agreement of Ward LJ and Moore-Bick LJ (Deputy Head of Civil Justice), Jackson LJ said:

'62. There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a)[2] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.
63. I hope that the forthcoming amendment to rule 36.14 will point the way to a more clear cut approach to the costs rules in future.'

1.10 *Magical Marking v Ware & Kay* [2013] EWHC 636 (Ch) was an action in which C claimed some £10 million but recovered only £28,000. Briggs J held that D was the successful party and made a costs order in D's favour. He said that the critical distinction between *Medway* and *Fox* was that the former was, but the latter was not, about the question who ought to be regarded in substance as the successful party: see [14].

1.11 Twelve days after the decision in *Magical Marking* the rule amendment foreshadowed in paragraph 63 of *Fox* came into force. On 1st April 2013 a new rule 36.14 (1A) was inserted into CPR Part 36, which provided:
'For the purposes of paragraph (1) in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly.'
It is a matter of public record that this was part of a package of civil justice reforms which were intended (inter alia) to encourage settlement and to promote certainty in litigation. That new rule is binding in litigation where there has been a 'near miss' offer, but of course rule 36.14 (1A) does not form part of arbitration law.

1.12 *Centreland Management Ltd v HSBC Pension Trust (UK) Ltd* [2013] 3328 (Ch) was decided on 4 July 2013. It concerned a rent review arbitration. The tenant offered an annual rent of £68.000 p.a.. Nine months later the arbitrator awarded £69,000 p.a.. The arbitrator ordered each side to bear its own costs and to pay half of the arbitrator's costs. The tenant appealed

[2] This was the relevant provision in the pre-2013 CPR.

against the costs order under s. 69 of the Arbitration act 1996. Vos J dismissed the appeal. At [38]-[39] he said:

'38. 'In my judgment arbitrators should be free to apply a single intelligible simple legal test in the different circumstances of different cases. The claimed special distinction between rent assessment and other cases does not change the test that should be applied. …
39. In the circumstances then that I have described, it seems to me that the arbitrator was entirely justified, at least in regarding the Calderbank offer made in October 2011 as a losing offer. He was therefore also justified in refusing to take it into account in making his award for costs and justified in making the award that he did as a proper exercise of his discretion.'

In other words, the arbitrator acted reasonably in disregarding a 'near miss' offer.

1.13 *Sugar Hut Group Ltd v AJ Insurance Service* [2016] EWCA Civ 46 was a professional negligence claim against insurance brokers. D made a Part 36 offer of £250,000 on top of previous interim payments. Eder J awarded £277,021. He ordered C to pay D's costs in respect of the period after expiry of the Part 36 offer. The Court of Appeal reversed that decision, observing that (a) the judge's award of damages exceeded the Part 36 offer by a comfortable margin and (b) there was no longer a 'near miss' rule: see the judgment of Tomlinson LJ at [31], with which Longmore and McCombe LJJ agreed. The statement that there was no longer a 'near miss' rule was, of course, a reference to the new CPR rule 36.14 (1A).

1.14 In *Rotam Agrochemical Co Ltd v GAT Microencapsulation GMBH* [2018] EWHC 3006 (Comm), C recovered €298,087. That represented 2% of its claim as initially put forward and 3% of its subsequently reduced claim. Butcher J noted that there were two different strands of authority. Having reviewed those strands, he concluded that in the case before him D was in substance the winner. He ordered C to pay 50% of D's costs.

1.15 Finally, I come to *Hamad M. Aldrees & Partners v Rotex Europe Ltd* [2019] EWHC 526 (TCC). This was an action in which C made claims on a variety of bases in respect of defective machines delivered by D. C eventually established breach of contract and recovered about 2% of its pleaded claim. But even that sum was not derisory. It was worthwhile suing to recover such a sum: see [45]. There was much to criticise in the conduct of both parties. Sir Antony Edwards-Stuart, the trial judge, reviewed the authorities on costs at some length. At [73] he said:
'I consider that this case, unlike some of the other cases to which I have referred, is one where the paramount consideration is the absence of any early and admissible offer to pay some compensation for Rotex's breach of contract.'
The judge then went on to order D to pay 20% of C's costs. The substantial discount (80%) was intended to reflect the various issues on which C had lost.

<u>(ii) the principles</u>

1.16 From that review of the authorities I derive the following principles:
(i) The first question to consider is which party has been successful.
(ii) If C has recovered the prize which it was claiming, then C is the successful party.
(iii) If C has failed to recover that prize, but has recovered some lesser relief which is not derisory and is worth suing for, then C is the successful party.
(iv) If C has recovered nothing or has only recovered derisory relief, which is not worth

suing for, then D is the successful party.
(v) Absent any relevant settlement offer, the successful party should generally recover its costs of the proceedings, subject to an appropriate discount to reflect (a) any issues which the successful party has lost and (b) any conduct matters.
(vi) If the losing party made a Part 36 or *Calderbank* or sealed offer which was as advantageous as (or more advantageous than) the result achieved and which the winning party rejected, the winning party should generally pay the losing party's costs (subject to any appropriate discount) in respect of the period after expiry of a reasonable time for accepting that advantageous offer.
(vii) An offer which is a 'near miss' does not avail a losing party in litigation by reason of rule 36.14 (1A). That rule does not apply in arbitration. Nevertheless, if the winning party has recovered substantial relief, it may well be a reasonable exercise of the arbitrator's discretion to disregard a 'near miss' offer (as happened in *Centreland*).

(iii) The tribunal's fees

1.17 In arbitration, the tribunal normally orders the parties to pay the tribunal's fees in the same proportion as it awards *inter partes* costs. Indeed, that is the assumption if the award is silent on the matter. So, if the tribunal orders D to pay 80% of C's costs, then it will normally order (or be deemed to have ordered) D to pay 80% of the tribunal's fees, with C paying the balance.

1.18 It is possible, however, to think of circumstances in which a different order might be appropriate. For example, if one party has specifically asked the tribunal to read a vast mass of material, which proves to be irrelevant. The tribunal is the servant of the parties. If we are asked to read a voluminous bundle and told that it is important, we will duly sit down and read it.

1.19 If the tribunal makes an issues-based order the tribunal's fees may form part of the general costs of the arbitration, or they may be the subject of a specific order.

1.20 By the time they collect the award, the parties will normally have paid the tribunal's fees in equal shares. The subsequent re-apportionment of the tribunal's fees will therefore form part of the resolution of costs between the parties after the event.

2. A CODA ON GOOD FAITH

2.1 For some time I have argued that, under English law, a 'good faith' provision adds nothing of substance to a commercial contract. Courts or tribunals may use it as a stepping-stone to arrive at specific obligations, but they do not need that stepping-stone. The derived obligations are inherent in the contract. They may arise on the proper construction of the contract or by implication or through the implied duty to co-operate in achieving fulfilment of the contract. In other words, there is no need for the intermediate concept of 'good faith'.

2.2 It has become clear,[3] however, that the common law is not developing in the direction which I have advocated. Nor will it develop in that direction after Leggatt LJ joins the Supreme Court next month. The ever-increasing recourse by judges to 'good faith' may be a

[3] For example, at the SCL seminar on good faith on 4 February 2020

function of the tendency of the common law and civil law to come together. Common lawyers and civil lawyers increasingly work together or sit together as co-arbitrators in the context of international arbitration, where most major construction disputes find their resolution.

2.3 I have looked at a number of recent cases in which courts have used express or implied good faith provisions to generate specific obligations, for example *Bates v Post Office Ltd* (No. 3) [2019] EWHC 606 (QB). I do not disagree with the results in any of those cases, although I might have been inclined to get there by a slightly different route. It may therefore be that the divide between 'traditional' common lawyers and the new school headed by Leggatt LJ, which makes extensive use of good faith obligations,[4] is a distinction without a difference.

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[4] For example, in *Yam Sengh v International Trade Corporation* [2013] EWHC 111 (QB), *Sheikh Tahnoon v Kent* [2018] EWHC 333 (Comm) and various lectures