Residential building disputes: Reform

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In a previous post, I referred to my recent instruction representing the Defendant in a hard-fought five-day trial in Manchester (before HHJ Stephen Davies) featuring five fact witnesses, eight expert witnesses, and many thousands of documents.

What made the case remarkable was its relatively low value and the disproportionate legal costs incurred. While the nature and resourcing of the trial would be consistent with a multi-million-pound dispute, in fact the Claimant had sued for only some £60,000 for unpaid invoices, and the Defendant had elected against bringing a counterclaim. In these circumstances, the combined cost budgets were for many multiples of the claim value and inevitably understated – by a wide margin – the actual costs incurred by the parties.

In the event, in a 40-page judgment, the learned Judge dismissed the claim and found that in fact the Claimant had been *overpaid* by the Defendant by some £24,000. (The Claimant was subsequently ordered to pay the Defendant's costs in full.) For present purposes, what makes for interesting reading is the learned Judge's suggestions at [7]–[9] in dealing with such residential building disputes which may be summarised as follows:

- At the first CCMC, it may be suitable to order: (a) disclosure limited to documents relied upon and to known adverse documents; (b) a single joint expert building surveyor to address all items in issue, both liability and valuation, with questions to the expert strictly for the purposes of clarification only; (c) a stay for mediation on receipt of the report and questions. If the parties are not willing to mediate and the judge does not consider it appropriate to order mediation, then there should be an order for compulsory early neutral evaluation before another TCC Judge.
- If no settlement is achieved then there should be further directions as follows: (d) CPR PD 57AC-compliant witness statements, limited to matters remaining in dispute; (e) a trial, which should not normally exceed one day in length, at which: (i) each party would have produced in advance detailed written opening submissions; (ii) no oral openings would be permitted; (iii) no more than one hour each for cross examination of each party's witnesses on their key evidence would be permitted; (iv) the single joint expert would attend remotely to answer questions from the judge and parties for no more than one hour in total; (v) there should be one hour each for oral closing submissions, followed by: (f) a judgment which would be as summary as the trial process.
- In terms of costs budgeting, the approved costs should not normally exceed £25,000 per party, broken down as: £2,500 for disclosure; £5,000 for expert evidence (which would include the party's half share of the expert's fee); £5,000 for mediation (including a half share of the mediator's fee); £2,500 for witness statements; and £10,000 for trial preparation, trial and post judgment matters.

The learned Judge's key reasoning was set out at [9], namely that such directions would be fair in an appropriate case since "*it is unlikely that a more intensive – and thus more lengthy and expensive – trial process would produce a result significantly different to the result produced through this procedure*."

These judicial suggestions have generated a good deal of commentary in the legal community, most of which is overwhelmingly positive, and for good reason. It is difficult to argue against such sensible proposals which seek to 'bake in' proportionality (both as to the Court's resources as well as the parties' legal costs) while producing a result which is very likely to be the same as a much more resource intensive process.

I had the privilege of discussing these matters with the learned Judge in a webinar (organised by the Association of Northern Mediators) on 20 April 2022. Many interesting points were raised in that webinar which are beyond the scope of this post. However, I wish to highlight three points worth reflecting upon:

- First, for relatively low value cases (including residential building disputes), costs risk is often a key driver in encouraging settlement. An unintended consequence of a more speedy and inexpensive trial process may be to encourage ***more*** litigation to trial. My case was exceptional, not least because of how unusual it was not to have been settled long before trial. Is this the correct 'poster case' to drive reform?
- Secondly, is the real lesson in this case more about costs and less about proportionality? Here, my client as the Defendant had no real choice but to defend this to trial, and even though he was awarded his costs in full, the Claimant shortly after appointed liquidators. In principle, recovery may be sought by various legal avenues (such as non-party cost orders and the various causes of action under insolvency and company law), but does this render the real battle one of attrition and wherewithal?
- Thirdly, what is the role of adjudication in residential building disputes? There is a credible argument for including such disputes within the scope of statutory adjudication with special protections for a consumer homeowner. The advantages of adjudication, such as its relative speed and inexpensiveness, as well as its practical effect of resolving most disputes (despite its formal temporarily binding nature), appear particularly well suited here.

What is clear is that reform is required, and the learned Judge's suggestions are much to be commended. However, more can be done to support finding effective and practical steps to realise the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

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