Arbitration - Recovering the Fees of a Claims Consultant

Piper Double Glazing Ltd v DC Contracts (1992) Ltd [1994] 1 All ER 177.

Section 20(2) of the Commercial Arbitration Act 1984 (NSW) allows a party to an arbitration to be represented by person who is not a lawyer. There are certain limitations which are not relevant for present purposes. Section 20(5) specifically exempts that person from the provisions of the Legal Practitioners Act 1987 which prohibit unqualified people from undertaking legal work.

If in an arbitration the successful party is represented by a claims consultant instead of a lawyer, how much of the consultant's fees can the successful party recover from the other party? This point was considered in *Piper Double Glazing Ltd. v DC Contracts (1992) Ltd.* [1994] 1 All ER 177, a decision of a single judge of the High Court in England. Although the decision is not binding on Australian courts, it is submitted that Australian courts would decide similarly.

Piper Double Glazing was the successful claimant in an arbitration against DC Contracts. The claimant used claims consultants James R Knowles Ltd. to advise and represent the claimant in the arbitration. On the taxation of costs in the High Court, the respondent argued first that on taxation, the Court had authority only to tax the costs of a lawyer or of a party in person and could not tax the costs of a claims consultant. The respondent argued that the Court had no power to allow any amount for the fees paid to the claims consultant.

The respondent argued that even if the court did allow costs paid to a non lawyer, those costs could not exceed the costs which would have been recoverable had the claimant used a lawyer. The respondent lost on both points.

The relevant provisions of the English Arbitration Act 1950 are almost word for word the same as section 34 (Costs) of the Commercial Arbitration Act 1984 (NSW). In England, as in NSW and other States, there is legislation directed to prohibiting persons without legal qualifications from recovering fees for carrying out legal work. The respondent relied on such legislation.

The judge held that the legislation was directed to unqualified persons acting as solicitors, pretending to be solicitors or drawing up legal documents such as transfers or papers for probate. He held that such acts are not to be confused with the doing of acts commonly done by solicitors, but which involve no representation that the actor is acting as a solicitor. The claims consultants did not act as solicitors in conducting the arbitration. Therefore there was no bar to them recovering their fees.

In rejecting the respondent's argument that costs awarded on taxation could not exceed the costs which would have been recoverable had the claimant used a lawyer, Potter J. said:

> "In so far as the taxing master may, in the case of a claims consultant, be considering a new and/or unconventional breed of litigator, it may be that the taxing master will consider that some difference of approach will be called for, not least to accommodate the extent to which, in relation to various items of work, it might be a case that the fee earner concerned has acted in a multi-disciplinary capacity. It might be, at least in theory, that in performing a particular task, the fee earner has in effect done two jobs at the same time and saved money for the client. On that basis, it might be, again at least in theory, that the taxing master would consider it appropriate to allow a charging rate for the single fee earner higher than the rate which might have been allowed in respect of two individual fee earners jointly rendering the same service. On the other hand, it may well be that a lower charging rate or fee will be considered appropriate in the case of an employee of a claims consultant who the master considers lacks the expertise of a conventional fee earner or otherwise provides a less valuable service. If the employment of claims consultants becomes widespread in the arbitration field, it may be that the taxation of their bills will become a developing science, in relation to which taxing masters will consider that particular scales or methods of charge, different from those developed in relation to solicitors, are appropriate.
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> Whether or not that is so, I have no doubt that taxing masters will and should be reluctant to develop or apply scales of charges, or indeed any approach to the taxation of costs of claims consultants, which might lead to any overall increase in the costs of arbitration."

The English decision that in taxation of costs there is no ceiling on consultant's costs by reference to solicitor's costs should be compared with the NSW Court of Appeal decision in *Cachia v Hanes* [1991] 23 NSWLR 304. In *Cachia* the Court held that so far as concerns individual items of out of pocket expenses, there was no such ceiling but that the total amount recoverable by a litigant in person should never be allowed to exceed what would have been recoverable if solicitors had been retained.

Cachia concerned a litigant in person in the NSW Supreme Court. There a claims consultant could not practice. For this reason the NSW case can be distinguished from the English case. However, it is likely that *Cachia* will one day be cited to support an argument that the costs of a claims consultant recoverable on taxation of costs cannot exceed the costs which would have been recoverable had a solicitor been retained instead.

In *Cachia* the NSW Court of appeal held that a litigant in person is not entitled to recover costs in respect of the time spent by the litigant in preparing the case, as distinct from out of pocket expenses. *Cachia* was considered by the General Division of the Federal Court of Australia in *Secretary, Department of Foreign Affairs and Trade v Boswell* [1992] 111 ALR 553. The Federal Court held that the litigant in person's out of pocket expenses could include loss of earnings for time reasonably spent by the litigant in preparing the case.

If a party to arbitration decides not to use a solicitor then, in NSW at least, there is much to be said for using a claims consultant rather than using the party's own time in preparing and conducting the case. If a successful litigant pays a claims consultant to prepare and conduct the case, then the costs of the claims consultant should be recoverable. Whether the whole of the costs are recoverable will depend upon the view of the taxing officer as to their reasonableness.

It is important to distinguish:

(a) the costs of preparation of the claim itself; and
(b) the costs of preparation and presentation of the case in arbitration.

The latter are costs of the arbitration. They commence no earlier than the commencement of the arbitration. It is those costs that are relevant for present purposes. It is those costs that the arbitrator considers after determining liability and quantum of damages.

The costs of preparation of the claim itself are part of the contract overheads. They would be incurred whether or not the claim goes to arbitration. If they are recoverable at all, it would be as part of the damages. Once the arbitrator makes a determination on damages, it is too late to claim those costs.

When engaging a claims consultant it is important to ensure that the consultant separately quantifies and invoices (a) costs of preparing the claim, and (b) costs of preparing and representing the client in the arbitration.

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Building Contracts - Multiple Causes of Damage

Friend & Booker Pty Ltd v Eurobodalla Shire Council, unreported, NSW Court of Appeal, 24 November 1993).

In *Friend & Booker Pty Ltd v Eurobodalla Shire Council* (24 November 1993), an Arbitrator published an award in which he found in favour of Friend & Booker. The major relevant damages claim was one for loss of trading. Friend & Booker contended that the significant reduction in its trading activities in the relevant period resulted from the council's breaches of duty in its contract with Friend & Booker relating to sewerage reticulation works in North Narooma. That argument substantially was accepted by the Arbitrator.

In considering the reasons for the reduction in trading, the Arbitrator directed his attention to a number of other contracts involving Friend & Booker. One of them, called "the Bridge Street Project", was found to be an overall disaster and undoubtedly cost Friend & Booker a lot of money. The Arbitrator concluded that Friend & Booker

> "may have survived either the Bridge Street Project or the Narooma Project by itself but not the two in combination, as far as continuing to trade at the same level as concerned. I am, therefore, of the view that of the assessed actual loss of profits of $662,000 an amount of $331,000 should be awarded as being the consequence of the Narooma situation".

On appeal, it was contended that this amounted to a clear error of law. It was argued that the finding of fact made by the Arbitrator should have led him to award the whole of the assessed actual loss to Friend & Booker.

The Court of Appeal stated in this regard:

> "It is, in my opinion, settled law in this State that if a Plaintiff is able to establish that the Defendant's breaches of contract were a cause of a particular loss then the Plaintiff will be entitled to be compensated in respect of that loss notwithstanding that there may have been other concurrent causes. This was the view expressed by Samuels JA ... in *Simonius Vischer* when he said ...:
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> > '... If a breach of contract is one of two causes, both co-operating and both of equal efficacy in causing loss to the Plaintiff, the party responsible for the breach is liable to the Plaintiff for that loss'."

In the event, the Court found that the Arbitrator had failed to find the facts necessary in law to support his conclusion and the case was remitted to him for further consideration.

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