

Does the winner always take all? A Recent Court Case: Brit Inns, Ltd. & Another v BDW Trading, Ltd. [2012]



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Is it always the case that the winner of a trial (no matter if it is by arbitration or litigation) is entitled to all of the monetary awards? This case concerns an exaggerated claim in which the defendant failed to adequately protect its position.

Facts

1. The project intended to demolish an old pub and build a ground floor bar with a restaurant in the basement.
2. The Defendant (BDW Trading) built the shell and handed it over to the Claimant for fitting-out works.
3. The Claimant (Brit Inn) was an insured company in liquidation. The "another" were the directors of the company.
4. The Claimant claimed damages for a flood in its restaurant that was caused by the negligence of the Defendant, a builder.
5. The basement was first flooded due to the negligence of Thames Water.
6. Following remedial works, the basement flooded again due to the Defendant's negligence.
7. The Defendant did not argue over its liability.
8. The restaurant operated for a few months, but retained a foul smell.
9. The Claimant closed the restaurant and claimed insurance.
10. The insurers paid an amount for damages and the loss of profit to the Claimant.
11. The insurers then brought a subrogated claim to recover money from the Defendant.
12. A dispute arose over whether or not the amount claimed was reasonable.

Held

1. In respect of the fitting-out works built the second time, the Claimant's claim was grossly exaggerated and was not properly investigated by the insurer before reimbursement.
2. There were no supports on what had/had not been renovated.

3. Loss of profit assessment had not been deduced from the actual profits.
4. An assessment by an expert found that the amount was significantly less than that which was claimed.

Comments

The trials on quantum only (i.e., "without prejudice save as to cost") were unusual. This case demonstrated that when a claim is shown to be exaggerated and that exaggeration was not dealt with by the party (or parties) when the claim was presented, subrogation may be problematic. J. Coulson, the judge who presided over this case, commented that it was "*an attritional battle*" involving inadequate documentation and invoices. It always pays to remember that the invoices of reinstatement costs are not necessarily decisive and the evidential burden is on the Claimant to show the practicality of the claimed costs and that they were actually incurred in the consequences of the incident.

It was commented that when a claimant's offers are consistently unrealistic, a defendant may be awarded cost protection in some circumstances.

Herbert Smith added that this case should not simply be regarded as an anomaly from a subrogation perspective. The decision in this case underscored the general importance to insurers of ensuring claims that were properly investigated in order for the sums that were paid out to be justifiably recovered.

In my opinion, no party truly won in this case and it was advisable that each party should look for sensible settlement offers as early as possible to avoid ending up in a scenario in which litigation goes wrong for everybody.

In conclusion, this case demonstrated the importance of carrying out a proper and realistic merit assessment at the outset and during any dispute. This should be one of the universal keynotes for pursuing or defending a claim in any dispute. Consulting one's experts and/or consultants in this respect is highly recommended. ■