Pursuing and Resisting Management Time Claims

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In many disputes one party will seek damages to compensate for its managerial and supervisory time spent coping with the other's contractual or tortious wrongdoing. In the author's experience the formulations and responses in such claims reveal widely differing views of what, in practice, should be shown to establish or to challenge such claims. The leading textbook on damages[2] touches only lightly upon this important topic and with that in mind this article seeks to draw some guidance from recent case law concerning the evidence and factors that are likely to influence judges.

It is usually legally foreseeable to the other contracting party or to a tortfeasor that a business may deploy some of its manpower towards mitigating the effects of an actionable wrong done to it. In ship damage cases the conventional practice has been to allow 1% of the general award as damages for business disruption, management time and the like[3] but the court has firmly set its face against adopting so simplistic an approach more widely.[4] Furthermore it is well known that a party's losses incurred in being tied up with lawyers or the litigation process are usually irrecoverable as costs or damages[5] and that only a claimant whose rights have been actionably interfered with can be compensated. Privity of contract or policy limits upon the duties owed in tort will usually preclude personal claims by individuals even if they have significantly more than the normal interest in the success of the damaged business.[6]

Of course if a claimant has to engage new personnel as additional employees or consultants specifically to mitigate its losses the net extra costs should be recoverable in principle.[7] However where no one identifiable has been brought in these claims are open to much greater dispute and a defendant will argue, for example, that the workforce overheads would have been incurred regardless of his wrongdoing and that the claimant has not met the evidential burden of proving a loss under this head.

It is hardly surprising that management time claims tend to be highly fact sensitive. Thus, when giving conditional leave to defend a £37,000 claim for management fees said to have been spent by the claimant subcontractor upon chasing a £400,000 debt from the defendant main contractor, Coulson J recently said that such claims

> "are not always easy to establish. They require two things, above all: first, they require a proper causal link between the cost incurred and the alleged default on the part of the defendant; and, secondly, they require proof of the extent to which the ordinary trading routine of the claimant was disturbed."[8]

[2] MacGregor on Damages, 18th Edition (2009) at 2-051, 32-014, 32-058 & 41-023

[3] Despite challenges to the principle – see Carisbrook Shipping CV5 v Bird Port Ltd [2005] 2 Lloyd's Rep. 626 at §170.

[4] See Tate & Lyle v Greater London Council [1982] 1 W.L.R. 149 at pages 151 to 152.

[5] But see Lord Wolff MR discussing enhanced interest under CPR Part 36 in Petrograde v Texaco [2002] 1 W.L.R. 947 CA at §§ 63 & 64.

[6] Examples are directors who have given personal guarantees and employees who are on sales commissions.

[7] Provided they are not expenses which "if recoverable at all, would be recoverable only under an order for costs" per Cairns LJ in Bolton v Mahadeva [1972] 1 W.L.R. 1009 CA when considering a claim for fees for expert assistance "obtained in view of a dispute that had arisen and with a view to being used in evidence if proceedings did become necessary, and in the hope that it would assist in the settlement of the dispute without proceedings being started.". A claim for over £6,000 for freelancers failed on this ground in the Aerospace Publishing case (see § 75).

[8] Clancy Consulting Ltd v Derwent Holdings Ltd [2010] EWHC 762 (TCC) at §42.

That observation reflects the leading case of Aerospace Publishing v Thames Water Utilities [2007] 110 Con LR 1 CA in which a valuable photographic and artistic archive was flooded by a burst water main. The publisher recovered its staff costs amounting to some £25,000 caused by their diversion from normal profit earning activities to countering the effects of the flood. The employee claim "related to work done by seven of them in the weeks, months and years after the flood referable to the works of salvage, which were delicate and complex, and other works of reorganisation reactive to the flood"[9] and can hardly be regarded as exorbitant in amount or nature. At paragraph 86 Wilson LJ set out the Court of Appeal's synthesis of the sometimes divergent views found in earlier decisions.

> "(a) The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established.
>
> (b) The claimant also has to establish that the diversion caused significant disruption to its business.
>
> (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."

Notwithstanding this authoritative guidance the earlier case law can still provide some valuable insights into the circumstances in which such claims are likely to succeed or to fail.

In Tate & Lyle v Greater London Council [1972] 1 W.L.R. 149 at 151C to 152H Forbes J rejected a claim for 2.5% of the award made in relation to wrongful silting saying.

> "I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern, can properly form the subject matter of a head of special damage. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects.[10] I do not believe that it would have been impossible for the plaintiff in this case to have kept some record to show the extent to which their tradingroutine was disturbed by the necessity for continual dredging sessions. In the absence of any evidence about the extent to which this occurred the only suggestion Mr Clarke can make is that I should follow Admiralty practice and award a percentage on the total damages ... While I am satisfied

[9] Per Wilson LJ at §76

[10] And that was said four decades ago

> that this head of damage can properly be claimed, I am not prepared to advance into an area of pure speculation when it comes to the quantum. I feel bound to hold that the plaintiffs have failed to prove that any sum is due under this head."

Standard Chartered Bank v Pakistan National Shipping Corporation [2001] 1 QB 167 CA involved a claim in deceit arising from the presentation of falsely dated bills of lading. The Defendant's appeal in the quantum proceedings succeeded only in respect of damages in relation to the salary costs of one of the claimant's employees. Potter LJ (with whom Henry LJ and Wall J agreed) said at paragraph 49

> "No doubt it was true as the judge stated, that, in visiting Vietnam, Mr Griffiths was engaged in an unusual task. However, it is not suggested that his trip abroad, as an employee engaged in the business of SCB and in respect of whose responsibilities his salary was in any event payable, led to any significant disruption in SCB's business or any loss of profit or increased expenditure on SCB's part (save in respect of travel, subsistence and other out-of pocket expenses which the judge awarded in any event). In certain situations, involving particular types of trading concern such a claim may be appropriate. In particular, building contractors who, by reason of delay, suffer increased costs attributable to a particular job which costs are irrecoverable elsewhere, may claim for a proportion of their fixed overheads, (including head office salaries) as part of their claim for consequential loss. However, that is not this case. There is no suggestion that the business of SCB, or the system of charging upon which its profits depend, were in any way adversely affected by the diversion of Mr Griffiths to Vietnam."

R+V Versicherung AG v Risk Insurance & Reinsurance Solutions SA [2006] EWHC 42 (Comm) determined numerous issues of principle in the assessment of damages where addenda to binding authorities to write reinsurance had arisen from a dishonest conspiracy. One of the matters to be decided was whether the claimant could recover the expense of managerial and staff time spent in investigating and mitigating the conspiracy and handling the claims, without the need to show any specific loss of profit. Gloster J reviewed the earlier authorities and concluded at paragraph 77.

> "In my judgment, as a matter of principle, such head of loss (i.e. the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable, notwithstanding that no additional expenditure "loss", or loss of revenue or profit can be shown. However, this is subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort; i.e. that the expenditure was directly attributable to the tort – see per Roxburgh LJ in British Motor Trades Association[11] at 569. This is perhaps simply another way of putting what Potter LJ said in Standard Chartered, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise the alleged wasted expenditure on wages cannot be said to be "directly

[11] And that was said four decades ago

attributable" to the tort."

Bridge UK Com Ltd v Abbey Pynford plc [2007] EWHC 728 (TCC) involved delay in installing a printing press. One of the heads of damages was 128 hours of management time spent by the claimant's New Business Manager in dealing with the problems arising from the defendant's breach of contract. These were dealt with by Ramsey J at paragraphs 121 to 130 of the judgment. After referring to an unreported decision of HH Judge Peter Bowsher QC to similar effect (Holman Group v Sherwood, 7th November 2001) the judge held that in the absence of records, a retrospective assessment in the form of a reconstruction from the witness's memory was acceptable. However the inherent uncertainties in such a method of assessment led the judge to reduce the recoverable hours to 100. Taking the employee's annual income and dividing by an assumed 52 week year at 40 hours per week, the judge came to an hourly rate of £48 and so awarded £4,800. He disallowed the claimant's proposed "opportunity costs" 25% uplift.

In 4 Eng Ltd v Harper [2009] Ch 91 fraudulent misrepresentations as to the target acquisition's financial position had induced the purchase of its share capital. Uncovering the extent and the details of the fraud had been a complex and time consuming task undertaken by the claimant's directors and managers. David Richards J did not regard this head of claim as an award of damages to the business through loss of management time under the Aerospace Publishing case but simply as the recoverable costs of investigating a fraud. Nevertheless the decision is an instructive one in the present context. The cost of employing outside professional accountancy services (at some £200 an hour) or taking on appropriate accountancy staff had been unaffordable and to preserve confidentiality and because their usual working hours were largely devoted to managing the business the directors undertook much of the work outside usual working hours. They resolved to pay themselves £100 per hour for such efforts and kept a contemporaneous, continuous and computerised log of their work. They clocked up 7,112 hours over the course of 3 years. The court was satisfied that such time was chargeable and rejected arguments that there should be a reduction because an outside firm would not have spent so long on the grounds that higher charge out rates would have produced a claim that might not have been less and might have been more and in any event such an option had not been affordable. In the event approaching £625,000 was awarded because the records of some of the hours had in fact referred to charges at £26 and £35 per hour.

What conclusions may be drawn from these cases?

Very large claims have succeeded when fraud or the equivalent has been established and where robust records of the time spent have been kept. However in any case where a management time claim may arise the claimants' lawyers should, at the earliest opportunity, emphasise to their clients the importance of keeping contemporaneous and detailed records of how much time is being spent by which diverted personnel, on what, why and, so far as possible, during which hours on which days. As the matter progresses careful recording and analysis of the resultant disruption to normal business should occur. Where appropriate there should be partners' or directors' resolutions that are not simply consistent with the claimants' decisions but

can be used to demonstrate why such actions were and continued to be reasonable responses to the wrong suffered. Claimants should naturally be encouraged to be realistic in pursuing such claims since exaggerated or exorbitant sums risk "the baby being thrown out with the bathwater."

Defendants should look for the absence of records and for unexplained gaps and inconsistencies. They should examine whether claimants have properly distinguished between irrecoverable involvement in the litigation process as opposed to efforts made to mitigate loss. Defendants will also need to consider attribution issues. Do the claimant's financial records show, for example, that the enterprise was failing anyway or that staff diversion caused no business disruption?Where claims appear excessive compared with the "paper trail" claimants can expect defendants to be sceptical and judges to be parsimonious.

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