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COUNTING THE COST

LITIGATION AND DISPUTE RESOLUTION

Dealing with another party's breach of contract or negligence can be a time-consuming process, involving the diversion of management and other staff from their normal revenue-generating activities. The recent case of *Azzurri Communications Limited v International Telecommunications Equipment Limited t/a SOS Communications* [2013] EWPC 17 is an example of the court being willing to compensate a claimant for the time that is wasted in this way.

The case demonstrates that, in order to bring a claim for wasted management and staff time, a claimant must adduce sufficient evidence to prove that staff have been diverted from their proper duties and that this has caused substantial disruption to the claimant's business. In practice, the best way to do this is to keep contemporaneous records of which staff were diverted from their normal duties, what they did and how long they spent doing it. Whilst a judge may be prepared to accept retrospective evidence of how employees' time was spent, evidence which is reconstructed in this way is likely to be regarded as less reliable and this may result in a reduction in the amount of damages awarded (as happened in *Bridge UK Con Limited (t/a Bridge Communications) v Abbey Pynford Plc* [2007] EWHC 728 (TCC)).

The case also demonstrates that the usual measure of damages will be the cost of employing the relevant staff, unless the claimant can plead and prove a positive case that those members of staff would have been involved in activities which would have produced more revenue for the claimant.

THE CASE IN BRIEF

The claimant company entered into a contract with a customer to supply a large number of telephones for a call centre. In order to fulfil that contract, the claimant bought a batch of telephone handsets from the defendant. Many of those handsets were faulty. Whilst the problems with the handsets were being investigated, it also subsequently emerged that the handsets were unlawful parallel imports.

The claimant issued proceedings against the defendant. As well as the cost of purchasing replacement handsets, the claimant sought damages to compensate it for the time spent (i) investigating the problems with the handsets and (ii) replacing the handsets.

The judge referred to the case of *Aerospace Publishing v Thames Water* [2007] EWCA Civ 3, where Wilson LJ summarised the relevant principles as follows:

- ◆ the fact and extent of the diversion of staff time have to be properly established. If the claimant fails to adduce evidence, which it would have been reasonable for it to adduce, it runs the risk that its claim will fail;
- ◆ the claimant also has to establish that the diversion caused significant disruption to its business; and
- ◆ in "*the ordinary case*", the court will infer that employees, whose efforts have been diverted, would have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time.

Applying these principles, the judge allowed the claim for time spent replacing the handsets. However, he rejected the claim for time spent investigating the problems with the handsets on the basis that he was not satisfied that Azzurri had "*adduced sufficient evidence from which to infer that the investigation of the fault caused sufficient diversion of staff to significantly disrupt Azzurri's business*".

The judge also rejected the claimant's claim that its damages should be calculated by reference to the employees' usual charge out rates. This was because the claimant had not put forward a positive case that it had actually lost the ability to charge out these individuals' time to clients. In those circumstances, the correct measure of damages was the cost of employing the relevant staff.

TIME SPENT BRINGING A CLAIM

A distinction needs to be drawn between time spent in bringing a claim and time spent remedying the consequences of a defendant's breach. A legally represented claimant is not entitled to be compensated for time spent in instructing its lawyers, either as costs or damages (even where the client, or its agent, is taking steps that would otherwise have to be taken by solicitors).

CONTACT DETAILS

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