

PROBLEMS FOR ADJUDICATORS GETTING PAID

“MONEY MONEY MONEY”

I work all night,

I work all day to pay the bills I have to pay,

Ain't it sad...?

Contractual Basis of Adjudication

1. Blindingly obvious we all want to be paid. The entitlement to payment is contractual and clarification was forthcoming about a year ago in a judgment handed down by the Honourable Mr Justice Ramsey in the TCC. The case being *Linnett-v-Halliwells LLP*. He described, *inter alia*, the basis of contractual adjudication against the background of the liability of a responding party for the fees of an adjudicator. The Judge noted that although adjudication is described as “*statutory adjudication*”, it is, on analysis, contractual. In his view the adjudication process consists of two agreements. One being the Adjudication Agreement, made between the parties to a construction contract either expressly or impliedly by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“Scheme”) under section 108 of the Housing Grants, Construction and Regeneration Act 1998 (“the Act”). The second agreement, the Adjudicator’s Agreement, is an agreement which may be made between the adjudicator and one or both parties.
- 2 The Judge related that the ability of an adjudicator to obtain fees depends on there being a contractual right to payment under the Adjudicator’s Agreement with one or both parties. He noted there is nothing in the Act which gives the adjudicator a right to payment. In this particular case, clause 41A.2 of the Building Contract envisaged the parties and adjudicator would execute the JCT Adjudication Agreement providing the adjudicator with a direct route to payment of his fees from the parties. However, no such agreement was executed.

3 The Judge indicated the adjudicator's contractual right to payment does not arise under and is not affected by the terms of the decision by which the adjudicator decides which party is to pay his fees and expenses. That decision determines who is to bear and pay his fees and expenses but does not affect any contractual right to payment which the adjudicator may have or provide a right to payment if he has no contractual right. The learned Judge said it may in practice, lead to the relevant party making payment direct to the adjudicator but it gives the adjudicator no enforceable rights to payment.

4 In essence, absent a jurisdictional challenge, the Judge considered if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract would be formed by conduct. He considered there would be implied terms that a party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so. Further, there would be an implied term that the adjudicator would act in accordance with the terms of the Adjudication Agreement between those parties.

5 In principle, the Judge saw no reason why the position should not be similar where only one party makes a contract with the adjudicator but the other does not:-

"In those circumstances , the party who does not make a contract but participates in the adjudication thereby requests the adjudicator to act and there is a contract made by conduct with the adjudicator who acts in that capacity as a result of that request. There would be similarly, be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator, that the party would be jointly and severally liable with the other party to make payment.

Right to Payment

6 A right to payment at common law for acting as an adjudicator absent a term in the adjudication agreement, contract or adjudication rules, arises as an implied term, see the

Supply of Goods and Services Act 1982, wherein at section 15, that section imports into the contract between the parties an implied term that the party contracting with the supplier (the adjudicator) will pay a "reasonable charge". What is a reasonable charge is a question of fact.

7 The Scheme at paragraph 25 entitles the adjudicator to the payment of a reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. Further the parties are made jointly and severally liable for such fees.

8 JCT 2005 adjudication provisions incorporate the Scheme but the 1998 version has its own rules which however do not stipulate that the fees are to be reasonable nevertheless there can be little doubt that a term would be implied that such fees be reasonable.

9 In *Stubbs Rich-v-Tolley*, the court considered an allegation that the hours charged by the adjudicator were unreasonably excessive. At first instance the adjudicator was ordered to repay the fees but on appeal, the court found that the adjudicator's fees were in fact a matter which fell within the provision at section 108 (4) of the Act:

"The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his function as adjudicator unless the act or omission is in bad faith".

10 It was also said that there was no statutory regime which could allow the re-examination of the adjudicator's fees and therefore that the immunity provided by section 108 (4) applied. The Judge criticised the finding in the court below that the fees were excessive:-

"The court must be very slow indeed to substitute its own view of what constitutes reasonable hours".

11 The upshot for all adjudicators and parties to an adjudication is that unless the adjudicator can be shown to have acted in bad faith, his or her fees are payable in full.

12 In his book *Construction Adjudication* HHJ Peter Coulson thinks it sensible for the adjudicator to keep the parties informed of the fees he is incurring as the adjudication progresses. He says that many adjudicators issue an invoice part way through the adjudication process with the expectation that at least some of the fees will have been paid by

the time that the decision is completed. I have never done this but has anyone else done so and what was the reaction by the parties?

Losing the right to Fees

- 13 HHJ Coulson advises that an adjudicator is not entitled to his fees, regardless of conduct and quotes the observation of the Judge HHJ Gilliland in the case of *Dr Rankilor-v-Perco Engineering Services Ltd* that it was :-

“a surprising submission that if an adjudicator’s decision had been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in effect a worthless decision without even any temporary binding legal effect”.

Late Decision

- 14 Judge Coulson’s opinions and observations are crucial, since he sits in the TCC and hands down many judgments concerning adjudication. He opines that if an adjudicator fails to produce his decision within the 28 days, (or extended agreed period), it would be difficult for the adjudicator to argue he was entitled to be paid fees when his failure to produce the decision in time had led to the production of a decision which in law was a nullity. His view is that in such circumstances the court might find that there had been a complete failure of consideration and the adjudicator was not entitled to any fees at all. Furthermore, in such circumstances the immunity in respect of anything done in the discharge of the Adjudicator’s functions:

“...is not liable for anything done or omitted in the discharge or purported discharge of his functions as an adjudicator unless the act or omission is in bad faith...”

might be of little assistance to the adjudicator.

- 15 In *Cubitt Building-v-Fleetglade Ltd*, the Judge was in fact Judge Coulson and although he concluded that the adjudicator's decision was completed and communicated in time, he nevertheless said that if he had reached the opposite conclusion:-

“the indemnity [presumably he meant immunity] in respect of anything done in the discharge of the adjudicator's functions would not have protected him, because the adjudicator's failure to complete the decision within the agreed period would have represented a complete failure on his part to discharge those functions at all”.

However, errors made by the adjudicator when he has jurisdiction do not appear to adversely affect the payment of fees. In the recent case *Rok Building-v-Celtic Composting Systems* the Judge said the Courts have made it clear that provided the adjudicator is acting within jurisdiction, the fact that the relevant factual or legal question has been answered incorrectly, the decision is still enforceable. Even glaringly obvious errors made by adjudicators within their jurisdiction will not be breaches of evidence or the rules of natural justice. In *Geoffrey Osborne-v-Atkins Rail*, the adjudicator made a “significant error” but nevertheless did not lose the right to his fees. However, the Judge described the decision as a model of its kind and the error might have occurred as a result of a misunderstanding.

Jurisdictional Challenge and Fees

- 16 A matter of concern to all adjudicators is the issue as regards liability for fees where a jurisdictional challenge is made during the course of the adjudication. The issue was decided in the case of *Linnet-v-Halliwell LLP*, referred to above.
- 17 Chris Linnet who was the adjudicator in the dispute between ISG (referring party) and the defendant Halliwell LLP (responding party) arising out of a contract to carry out fit out works at Halliwells' new office in Manchester. In the court proceedings, Chris Linnet claimed his fees and expenses £2,436.95 including VAT, against Halliwells, who raised jurisdictional challenges during the course of the adjudication.

- 18 Halliwells contended they were not liable to the adjudicator for such fees and expenses, having taken an objection during the adjudication to the Adjudicator's jurisdiction. Their contention was that the only route for the adjudicator to obtain payment was to take action against ISG, who could then seek to claim from Halliwells in enforcement proceedings, which would then be resisted by Halliwells on jurisdictional grounds.
- 19 In his judgement, HHJ Ramsey considered the position when there is a jurisdictional issue. He said the party raising this issue has two options. First, it can withdraw and take no further part in the proceedings and leaving the adjudicator and the other party to proceed at their risk. In such circumstances there would have been no request for the adjudicator to do anything and would be difficult to make that party liable for the fees and expenses of the adjudicator.
- 20 Secondly, the challenging party can make an assertion of lack of jurisdiction but continue to participate in the proceedings, without prejudice to that contention. However, by so participating, then in principle as described above, the party has requested the adjudicator to adjudicate on the dispute and will generally be liable for the reasonable fees and expenses of the adjudicator on the same basis as if no jurisdictional challenge had been made.
- 21 A further point is that if the adjudicator is found not to have jurisdiction then his decision will be null and void and this will affect the ability of the successful party to recover from the losing party sums based on the adjudicator's allocation of fees in the invalid decision.

Protecting Fees

- 22 In the present harsh financial climate, many adjudicators are finding that at the conclusion of the adjudication that the party held liable to pay the fees is very slow to pay if at all and notwithstanding joint and several liability that neither of the participating parties will pay the fees. Thus, time consuming court proceedings must be undertaken to accomplish recovery of those fees, which even when successful may be stymied since the liable party goes into liquidation. Mindful of these potential difficulties, adjudicators have sought to protect their fees by different approaches which unfortunately have not found favour with the courts.

Lien

- 23 Adjudicators have sought to impose a lien on their fees by refusing to release their decision until those fees have been paid in full. However, the courts have taken the stance, that since the essence of adjudication is speed and that the time limit of 28 days, or whatever an extended period may be, the decision must be released prior to the expiration of that relevant period. In the Scottish case of *St Andrews Bay Development Ltd-v-HBG Management Ltd* the court said the payment of adjudicator's fees could not be allowed to impede the statutory process or justify a failure to observe its requirements.
- 24 In hearing the case of *Cubitt Building & Interiors Ltd-v-Fleetglade Ltd* the TCC considered the adjudicator's terms which stated expressly that a lien might be exercised over the release of the decision until either party had paid the fees. The Judge thought that such an open ended extension of the statutory period was contrary to the whole principle of adjudication and referred to the *St Andrews Bay* case, and held that the adjudicator was not entitled to exercise a lien over the release of his decision, either as a contractual principle or as a matter of law.
- 25 The Judge said that the overriding obligation on the adjudicator was to both complete and communicate his decision within the 28 day period or agreed extended period and the potential lien was contrary to that overriding obligation.

Fees up front

- 26 *Mott MacDonald Ltd-v-London & Regional Properties Ltd*, the court as well as deciding that the lien the adjudicator had sought to impose was contrary to paragraphs 12 (a) and 19 (3) of the Scheme, found that the adjudicator appeared to lack impartiality, because he had made it a condition of his appointment that his fees would first have to be paid by the referring party before he delivered his decision to the parties, and then by appearing to enforce that pre-condition. HHJ Thornton said, that the adjudicator may not be, or appear to be, financially beholden to one party, particularly the referring party, or place himself in the position in which he might appear to be more partial to one side than the other.
- 27 It has been suggested that a potential answer might be to extend the time for the decision by having the parties' agreement set out in the adjudicator's terms and conditions. Those terms

require payment on account before you do anything and further acknowledge the parties' agreement to extend your time for reaching a decision by the amount in days it takes to receive payment. Crucially, the terms and conditions are expressed to be accepted (if not signed and returned) by that party's participation in the adjudication.

Provisional Invoices

- 28 The adjudicator would need to issue invoices a number of days before the decision was due. The problem is if one or both parties do not pay, there are no sanctions. You will in any event have to release the decision by the 28th day.

Solicitors Liability

- 29 It has been suggested that the RICS application form for the nomination of an adjudicator may be capable of making the solicitor acting for the referring party responsible for the payment of the adjudicator's fees. It used to declare:

"I/We undertake to be responsible for payment of the reasonable professional fees and costs of the person nominated..."

However, such application currently states:

"I/We undertake to ensure that the reasonable professional fees and costs of the adjudicator nominated are paid..."

- 30 Plainly wording of the original undertaking was much stronger in favour of the adjudicator. What led to this change by the RICS is unknown to me but RICS members may be able to shed light on this? On the basis of the original undertaking to the RICS not the adjudicator, it was possible to attempt to enforce the provisions of the contract between the RICS and solicitor using the Contracts (Rights of Third Parties) Act 1999, as the term set out does purport to confer a benefit on the adjudicator and the adjudicator is expressly identified by name as answering a particular description. However, the solicitor would be entitled to rely on the same defence as would be available to the RICS and would advance there had been no loss suffered.

31 Alternatively, the undertaking might have provided a route to recovery. According to the Solicitors Regulation Authority-Code of Conduct at Rule 10.05:

“An undertaking is any statement, made by you or your firm, that you or your firm will do something or cause something to be done...” and

“If you give an undertaking on behalf of a client it will usually fall within the definition of an undertaking and its performance would, therefore be your responsibility...”

32 The difficulty is that the undertaking or assertion was not provided to the person seeking to rely upon it. Older adjudications still in progress may contain the original undertaking and may provide a way to recover fees that would otherwise be lost.

33 You could of course have a term in your terms and conditions similar to that of the original RICS undertaking, made directly to you. Alternatively, include a term that in any event the parties’ solicitors will remain liable for your fees if the parties fail to pay.

34 HHJ Coulson recognises that the payment of adjudicator’s fees will remain a problem area for adjudicators but, in the light of the 1996 Act, he says there is little that can obviously be done to alleviate such commercial difficulties.

Rules must be obeyed?

“...but I was a fool,

playing by the rules...

but what can I say, rules must be o-beyed...

The win-ner takes it all”

35 Of course there is nothing to prevent any adjudicator by way of his terms and conditions from attempting to impose a lien over his fees or from asking for payment up front. It may well be that the parties will not object to either strategy but there remains the risk that objection may

be forthcoming from either or both parties. If so, the adjudicator may modify his stance or resign. The degree of risk will likely turn on whether the parties are represented and the knowledge that both the representatives and the parties have concerning the law relating to adjudication. If you choose to engage in a risk strategy, just like the banks, you will of course not be bailed out by the taxpayer and there remains the possibility that some disgruntled party may seek to recover his adjudication costs from the adjudicator.

36 The ICE Adjudication Procedure 1997 although recently modified by removing the right for the adjudicator to exercise a lien nevertheless contains in the Schedule to the Adjudicator's Agreement, the condition that a specified sum (the adjudicator specifies the amount) shall be paid to the adjudicator, such sum to be shared equally between the parties. By the parties contracting with each other based upon an ICE Contract which stipulates that the adjudication is to be conducted under the ICE Adjudication Procedure 1997 they may be taken to have agreed to the terms of the Adjudicator's Agreement. Problem is if only one party pays, then there may be an allegation of apparent bias.

37 Must keep matters in perspective. If you work as an adviser with one client, if he goes bust you get nothing. At least with adjudication you have two chances of being paid – risk is an inevitable part of life!

38 Do not worry too much but sit back and await a call from your ANB:-

“I was sitting by the phone

I was waiting all alone...

RING RING RING

why don't you give me a call?”

Brian Holloway

2 February 2010