

CIArb East Anglia Branch

**Adjudication Update 2018
(You forgot in 2017)**

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Costs in Adjudication

- **When will we get an answer on costs under Late Payment of Commercial Debts Regulations 2013? This was on my 2016 slides**
- **We have it**
- **Enviroflow Management Limited v Redhill Works (Nottingham) Limited**

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Enviroflow

- **What the Court said:**
- The starting point is that section 5A of the Late Payment Act provides for there to be an implied term in the contract between the parties, the effect of which is that a fixed sum shall be paid in respect of the costs of recovering the debt of £100 and, if that is not sufficient to meet the reasonable costs of the party recovering the debt, that party shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs.
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Enviroflow

- In this case, by reason of the Late Payment Act, Enviroflow was entitled to seek its reasonable costs in recovering the sums due in respect of interim applications for payment by reason of an implied term. That implied term falls within the definition of "any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract." Therefore, it is caught by section 108A, subsection (2), and is ineffective unless the subject of an agreement made in writing after the notice of adjudication.
- Is this correct?

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Fees

- **The Vinden Partnership Ltd v Orca LGS Solutions Ltd & Anor [2017] EWHC B24 (TCC)**
- **Waste of time and money**
- **Fees unreasonable**
- **Awarded costs of pursuing fees and Late Payment of Commercial Debts (Interest) Act 1998 interest**

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Oral Contracts

- **Dacy Building Services Ltd v IDM Properties LLP [2018] EWHC 178 (TCC)**
- **The problem of part oral part written**
- **28. This case is, I think, a good example of the change. In my view, this would not have been a dispute that could have been referred to adjudication under the old law. However, following the change in the law, it was validly referred to [the adjudicator] for decision in Adjudication 1. Thus, [the adjudicator] had to deal with all of the issues (both contractual and financial) within the limited timetable allowed by adjudication. In my view, in such cases, the courts are going to have to give adjudicators some latitude as they grapple with these difficulties. In an ordinary case, and depending on the words of the notice, it may be unduly restrictive to conclude that an adjudicator could decide what the contract was not, but not what the contract was. Similarly, it may be unduly restrictive to say that any notice of adjudication which raised the existence of the contract and/or its precise terms (on the one hand), and the financial claims thereunder (on the other), somehow involved more than one dispute."**

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Wrong Contract

- M Hart Construction Ltd & Anor v Ideal Response Group Ltd (Rev 1) [2018] EWHC 314 (TCC)
- Three Adjudications
- MHCL not the contracting party in each
- Held 2-1 but which way and why?

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Frolic of your own- Natural Justice

- Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 102 (TCC)
- VH's case as to breach of natural justice is simple: it says that the Adjudicator's decision as to the true construction of the MOU did not reflect an argument that had been advanced by either party and that this was therefore a case in which a central finding by the Adjudicator involved him in "going off on a frolic of his own".
- In the recent decision of *AECOM Design Build Limited v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC), Fraser J was invited to accept a very similar argument. He referred to the decision of Edwards-Stuart J in *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC), in which Edwards-Stuart J cited with approval from the earlier judgment of Akenhead J in *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) [2008] BLR 250 at [57](e).

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Frolic of your own

- At paragraphs 43 and 44 of his judgment in *AECOM Design Build Limited v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC), Fraser J went on to say:
- "43. Edwards-Stuart J also stated in *Roe Brickwork Ltd v Wates Construction Ltd* [2013] EWHC 3417 (TCC) at [24] that "there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator".

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Judge as Quantity Surveyor

- Severfield (UK) Ltd v Duro Felguera UK Ltd (No. 2) [2017] EWHC 3066 (TCC)
- Is this the approach an Adjudicator can and should take?

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True Value

- Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)
- This is scheduled for the Court of Appeal 9 – 10 October 2018.
- Issues:
- Can True Value v Default Notice be separate disputes
- If they are can True Value trump a valid default notice

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True Value

- Can a default Notice be disputed at all?
- Is there a basis on which an Adjudicator's decision can be opened up reviewed and revised?
- Must the Default Notice be paid before true value is sought.
- Can an Adjudicator award re-payment

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