

ADJUDICATION: LIABILITY FOR OPPONENTS COSTS: PART 2

- ▶ The question of recoverability of the legal costs of adjudication has now come before the Court.
- ▶ Is there a conflict between the Construction Act 1996 (as amended) (Construction Act) and the Late Payment of Commercial Debts (Interest) Act 1998 (Late Payment Act)?
- ▶ Is adjudication still fundamentally cost neutral, with the only cost risk being unsuccessful party paying the adjudication costs?

What's it about?

In the Winter 2017 edition of Constructive Comments, we provided an update on whether the unpaid party can recover its legal costs of adjudication under the Late Payment Act.

AG's view was that S108A of the Construction Act renders "any contractual provision" which concerns the allocation of costs between the parties "ineffective" unless it is made after the giving of the notice of intention to refer the dispute to adjudication. The provision under the Late Payment Act should be caught by that prohibition in the Construction Act. Due to a Court decision in the case of *Lulu Construction Ltd v Mulalley & Co Ltd [2016] EWHC 1852 (TCC)*, unpaid parties were regularly claiming (and being awarded) their costs of the adjudication.

In the, unreported, case of *Enviroflow Management Ltd v Redhill Works (Nottingham) Limited (2017)*, the issue of legal costs of adjudication was again brought before the Court for consideration.

Why does it matter?

An adjudicator found in Enviroflow's favour and awarded it £81,000 plus interest, and its "reasonable costs" of recovering the debt.

Enforcement proceedings were issued and one issue for the Court was whether the adjudicator had jurisdiction to award Enviroflow its costs of the adjudication.

The Court held that:

- ▶ S.5A of the Late Payment Act provides an implied term that a successful party is entitled to its costs of recovering a debt.
- ▶ S108A of the Construction Act provides that the legal costs of an adjudication can only be awarded where an agreement was made in writing
- ▶ The implied term was caught by S108A of the Construction Act and was ineffective.
- ▶ The adjudicator had no jurisdiction to make the costs award and this element was severed from his decision.

Now what?

The Courts are enforcing the stance that adjudication is cost neutral, with the cost risk being limited to the unsuccessful party paying the adjudicator's costs.

Careful consideration, including in terms of costs, should always be given prior to commencing an adjudication. Depending on the size of the dispute, some adjudications can run for months, with both parties to the adjudication (and indeed the adjudicator) incurring substantial costs. As a costs neutral process, thought needs to be given to the likely costs, even where you have a good claim.

Who to contact?

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