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“Adjudicator Knows Best” – A & V Building Solution Ltd v J & B Hopkins Ltd [2024] EWHC 2295 (TCC) (6 September 2024)

A & V Building Solution Ltd v J & B Hopkins Ltd [2024] EWHC 2295 (TCC)

Date: 6 September 2024

Judge: Mr Roger Ter Haar KC (Sitting as a Deputy High Court Judge)

Keywords:

Adjudicator’s decision, Adjudicator’s fees, Finality of adjudication, Binding decision, Construction adjudication, TCC Clause 12 interest, Late Payment of Commercial Debts Act, Statutory interest, Substantial remedy, Contractual interest clause, Fee allocation, Interest on damages, Payment dispute, Measured works claim, Construction contract law, Enforcement of adjudication.

Summary

This case centres on the question of whether an adjudicator's decision on their own fees, even if later found to be incorrect by the court, remains binding on the parties. It also addresses whether a clause within a contract can preclude a party from claiming interest under the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act").

Key Themes:

1. ***Finality of Adjudicators' Decisions on Fees:*** *This case confirms that an adjudicator’s decision regarding their fees remains binding, even if the substantive outcome of the adjudication is later overturned by the court. This principle, rooted in case law, emphasises that adjudicators’ authority on fee allocation is not subject to challenge.*
2. ***Interest Under the Late Payment of Commercial Debts (Interest) Act 1998:*** *The court examined whether contractual provisions can override statutory interest claims. It found that certain damages, such as loss of profits and adjudicators' fees, do not qualify as "debts" under the 1998 Act, and therefore, statutory interest does not apply to them.*
3. ***Effectiveness of Contractual Remedies for Interest:*** *The court scrutinised whether a contract clause providing for a 2% interest rate over the Bank of England base rate could preclude statutory interest. It found that this clause did not provide a "substantial remedy" as required by the 1998 Act, largely because it was one-sided and failed to account for market fluctuations, making it commercially unreasonable.*

Background

A & V Building Solution Limited (**"A & V"**), the subcontractor, and J & B Hopkins Limited (**"J&BH"**), the contractor, were engaged in a dispute arising from a construction project. The parties had gone through multiple adjudications, resulting in conflicting decisions.

The court had previously ruled on the substantive issues of the case, finding in favour of A & V and determining the amount owed. This judgment focused on resolving outstanding matters related to Adjudicators' Fees, Interest, set-off and enforcement costs.

1. Adjudicators' Fees [14-50]: The core issue was the liability for two sets of adjudicators' fees (Mr Blizzard and Mr Smith). A & V argued that J&BH should bear these costs because the court had overturned Mr Smith's previous decision, which had found in favour of J&BH. J&BH contended that the adjudicators' decisions on fees were final and not subject to change, citing legal precedents including Castle Inns (Stirling) Ltd v Clark Contracts Ltd (Scotland) and Coulson on Construction Adjudication. The court examined relevant case law, including:

- ***Castle Inns (Stirling) Ltd v Clark Contracts Ltd:*** This case established that an adjudicator's decision on liability for their fees is a matter within their jurisdiction and generally not subject to judicial review (12).
- ***TSG Building Services plc v South Anglia Housing Ltd:*** Here, the court, while overturning the adjudicator's decision on the substantive matter, still upheld their decision on liability for fees, emphasising the limited role of the court in reviewing such decisions (3).
- ***Adam Architecture Ltd v Halsbury Homes Ltd:*** While this case involved a contractual clause addressing the recovery of adjudicator's fees, the judgment emphasised the binding nature of adjudicators' decisions on such matters (456).
- ***D McLaughlin & Sons Ltd v East Ayrshire Council:*** This case, decided by the Scottish Court of Session, supported the principle that an adjudicator's decision on their fees is final and cannot be revisited even if their decision on the substantive dispute is later overturned (67).

Court's Ruling on Adjudicators' Fees

After analysing the case law, the court upheld the principle that an adjudicator's decision on their fees is final and not subject to challenge, even if the substantive outcome of the adjudication is later overturned by the court. This principle was established in Castle Inns and reaffirmed in subsequent case law [24-32].

- **Mr Blizzard's Fees:** The court reaffirmed that A & V was entitled to recover 50% of Mr Blizzard's fees (£17,400), as decided in the prior judgment on 16 June 2023 [16]. The court rejected A & V's attempt to claim the full amount of Mr Blizzard's fees (£34,800) [17].
- **Mr Smith's Fees:** The court ruled that since J&BH was the successful party in Mr Smith's adjudication, A & V was liable for Mr Smith's fees (£13,962). Although Mr Smith's decision was overturned, the court found that there was no procedural basis to reallocate the liability for those fees [21]-[23], [50].

2. Interest on Judgment Sums [51]-[86]

- **Claim for Statutory Interest:** A & V sought interest under the Late Payment of Commercial Debts (Interest) Act 1998, at a rate of 13.25% for the sums awarded in the June 2024 judgment, which included both the measured works claim (£101,543.17) and adjudicators' fees.
- **J&BH's Argument:** J&BH challenged the application of the statutory interest, arguing that the

sub-contract contained a contractual interest clause (Clause 12) which it claimed provided a "substantial remedy" under the 1998 Act, thus ousting the statutory interest rate [64-66].

Court's Decision on Interest

- **Measured Works Claim:** The court awarded interest at the statutory rate of 8% over the Bank of England base rate from May 2021 (final date for payment), rejecting J&BH's argument that the sub-contract provided a substantial remedy [75-76].
- **Loss of Profits Damages:** For the loss of profits award, the court set the interest rate at 4% above base, noting that the Clause 12 interest rate of 2% was not a fair commercial rate in the circumstances [77-81].
- **Adjudicators' Fees:** Simple interest at 4% over the base rate was also applied to Mr Blizzard's fees from 3 March 2022, with the court deeming this rate more appropriate [83].

Court's Decision regarding Set-Off and Enforcement Costs [84]-[86]: J&BH was awarded interest on its enforcement costs and Mr Smith's fees, which had been part of the original judgment in its favour. The court did not apply a formal set-off but acknowledged that the sums awarded to J&BH could be accounted for when calculating the final amounts payable between the parties.

Key Legal Principles

1. ***Finality of Adjudicators' Fee Decisions:*** *The court upheld the principle that an adjudicator's decision on their fees is final and not subject to challenge, even if the substantive outcome of the adjudication is later overturned by the court. This principle was established in Castle Inns and reaffirmed in subsequent case law [24-32].*
2. ***Interest on Damages and Fees:*** *The court distinguished between claims that qualify for interest under the 1998 Act and those that do not. It found that damages for loss of profits and adjudicators' fees do not constitute "debts" under the Act, thus statutory interest does not apply. Instead, a fair commercial rate of 4% over base was deemed appropriate [60-63].*
3. ***Effect of Contractual Remedies:*** *The court carefully analysed Clause 12 of the sub-contract, which provided for a 2% interest rate over the Bank of England base rate for late payments. It concluded that this clause did not offer a "substantial remedy" under the 1998 Act, primarily because it was one-sided and failed to account for rising interest rates [71]-[74].*

Conclusion

The court's ruling clarified the treatment of adjudicators' fees and the application of interest in construction disputes. While A & V successfully claimed part of the adjudicators' fees and statutory interest on the measured works claim, it was liable for Mr Smith's fees. The judgment also reinforced the finality of adjudicators' fee decisions and set out important guidance on how contractual interest clauses are interpreted in light of statutory interest provisions.

Key Takeaway:

The court's ruling reinforces the binding nature of adjudicators' fee decisions, emphasising that they remain final even when the substantive ruling is later reversed. It also underscores that interest clauses in contracts must offer a "substantial remedy" to displace statutory interest rights, providing clarity on how such clauses should be drafted to withstand scrutiny under the Late Payment of Commercial Debts (Interest) Act 1998.

Parting thoughts

In the grand theatre of construction adjudication, where the script is often rewritten by courts and the plot twists are less dramatic than a slow-drying screed, one immutable character remains: the adjudicator's invoice. Mr Roger ter Haar KC's decision confirms, with all the dry precision of a laser level, that an adjudicator's ruling on who pays their fees is as unshakable as a freshly poured concrete slab—regardless of whether their underlying decision is later demolished by the court.

Attempting to claw back those fees, as A & V did with the doggedness of a subcontractor chasing a snag list payment, is legally futile. The law, it seems, has long accepted that while adjudicators may be wrong, they are never wrong about their own paycheque. If they say you owe them for their services, you do—end of story, no set-off, no sob story, and certainly no refunds.

On the thornier issue of interest, the judgment reminds that contractual remedies must be more than just token gestures scribbled by risk-averse lawyers. A 2% interest clause masquerading as a "substantial remedy" under the Late Payment of Commercial Debts (Interest) Act 1998 was given the judicial side-eye it deserved. The court found it about as effective as a chocolate teapot—particularly when designed to benefit only one party and indifferent to rising base rates.

So, the takeaways? If you're drafting an interest clause, make it commercially reasonable, symmetrical, and future-proof. And if you're looking to duck adjudicator fees because the decision went south—don't. It's quicker and cheaper to pay up, nurse your pride, and get back to the site.

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