

August 17, 2025

## Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022] EWCA Civ 153 – When Bad Faith Isn’t Bad, Just Badly Alleged

[Steve Ward Services \(UK\) Ltd v Davies & Davies Associates Ltd \[2022\] EWCA Civ 153 \(14 February 2022\)](#)

[Davies & Davies Associates Ltd v Steve Ward Services \(UK\) Ltd \[2021\] EWHC 1337 \(TCC\) \(19 May 2021\)](#)

### **Judges:**

Court of Appeal – Lord Justice Moylan, Lord Justice Coulson and Lord Justice Arnold

Technology and Construction Court – Mr Roger Ter Haar QC, Deputy High Court Judge

### **Key Words:**

*Adjudicator’s fees, resignation, jurisdiction, contractual interpretation, bad faith, Unfair Contract Terms Act 1977, PC Harrington, construction adjudication*

### **Summary**

The dispute arose from a claim by Davies & Davies Associates Ltd for the fees of Mr Nigel Davies, who had acted as adjudicator in a construction dispute between Steve Ward Services Ltd (SWS) and Bhavishya Investment Ltd (BIL). Mr Davies resigned after identifying a jurisdictional problem concerning the identity of the contracting party (TCC [32, 66]; CoA [1, 23, 30]).

SWS refused to pay, citing repudiatory breach and relying on PC Harrington Contractors Ltd v Systech International Ltd (TCC [33]; CoA [32]).

At first instance, the TCC held that although Mr Davies’ reasoning was “erroneous,” his resignation was not an abandonment. His terms entitled him to payment absent bad faith, and the clause was reasonable under UCTA (TCC [63, 66, 73, 79, 85, 89]; CoA [2]).

The Court of Appeal dismissed SWS’s appeal and upheld Mr Davies’ cross-appeal. It found his jurisdictional concerns valid, his entitlement to fees clear, no bad faith established, and UCTA inapplicable (CoA [88, 99, 105, 111]).

## Key Themes:

- **Adjudicator's Fees:** entitlement even when no decision is delivered (TCC [47, 50], CoA [1-2, 75-76]).
- **Jurisdiction Powers:** adjudicators can and must consider jurisdiction, even unprompted (TCC [51, 58], CoA [21-22, 37, 50-63]).
- **Contractual Terms:** precise wording on entitlement to fees if proceedings cease (TCC [59, 67-69]; CoA [68, 76]).
- **Bad Faith:** requires dishonesty or unconscionability, not mere error (TCC [35, 43, 69-81]; CoA [34, 89-99]).
- **UCTA 1977:** fee clauses generally outside its scope and reasonable in any event (TCC [82-85]; CoA [101-107]).
- **Legacy of PC Harrington:** continues to shape adjudicators' contractual drafting (TCC [33, 44-47, 66, 69-70, 75, 77]; CoA [72, 74-76, 92-94, 99]).

## Background

SWS carried out works at a restaurant, "Funky Brownz" (TCC [4]; CoA [9]). The unsigned contract identified Ms Patel, not BIL, as the client (TCC [8-11]; CoA [9-10]). Invoices were nonetheless addressed to and paid by BIL (TCC [6, 11]; CoA [11-12]).

Following disputes over payment and defects (TCC [13-15]; CoA [11-13]), SWS pursued adjudication. In the first adjudication, jurisdiction was defeated on a technicality; SWS paid Mr Davies' fees (TCC [25-27]; CoA [13]).

In the second adjudication, Mr Davies' terms again applied. These provided for fees if the adjudication ceased "for any reason whatsoever," subject only to bad faith (TCC [35, 50, 71]; CoA [18]). After examining the contract, Mr Davies concluded that the client was Ms Patel, not BIL, and resigned (TCC [32]; CoA [23-30]). He invoiced £4,290 (TCC [32]; CoA [31]). SWS refused to pay, leading to litigation (TCC [1-2]; CoA [32]).

## Legal Issues and Analysis

### Issue 1: Jurisdictional Issue?

- **TCC:** real jurisdictional problem; contract was with Ms Patel, not BIL (TCC [55, 57]; CoA [32, 39-40]).
- **CoA:** confirmed; waiver arguments overstated; adjudicator not obliged to test hypothetical enforcement defences (CoA [44-51]).
- **Conclusion:** there was a clear jurisdictional issue (CoA [44, 51]).

### Issue 2: Right to Resign?

- **TCC:** resignation permissible but reasoning "erroneous" (TCC [62, 65-67]; CoA [33, 36, 52-53, 63, 111]).
- **CoA:** resignation proper; adjudicators must consider jurisdiction; failure to give a final warning was minor (CoA [59-66]).
- **Conclusion:** resignation valid, reasons proper (CoA [36, 55-57, 63, 67, 111]).

### Issue 3: Fees?

- **TCC:** clause entitled adjudicator to fees unless bad faith (TCC [71, 73, 80]).
- **CoA:** agreed; clause straightforward and commercially sensible (CoA [77-88]).
- **Conclusion:** fees due (CoA [77, 88]).

#### Issue 4: Bad Faith?

- **TCC:** none; acted diligently (TCC [79]; CoA [34, 66, 89, 97]).
- **CoA:** bad faith = dishonesty/unconscionability; not met here (CoA [90-98]).
- **Conclusion:** no bad faith (CoA [96-98]).

#### Issue 5: UCTA?

- **TCC:** doubted UCTA applied; clause reasonable (TCC [84-85]; CoA [101]).
- **CoA:** UCTA did not apply; even if it did, terms were reasonable (CoA [103-107]).
- **Conclusion:** terms valid.

#### Issue 6: Costs?

- **TCC:** £26,328 costs upheld (CoA [108]).
- **CoA:** no interference; although litigation costs disproportionate (CoA [108-110]).
- **Conclusion:** costs order stands (CoA [110-111]).

The High Court awarded £4,290 plus VAT and interest to Davies & Davies Associates Ltd. The Court of Appeal upheld the decision, confirming Mr Davies' resignation was proper, his entitlement to fees secure, bad faith absent, and UCTA irrelevant.

#### Key Takeaway:

- **Resignation:** *adjudicators may resign under the Scheme (CoA [53, 56, 105]).*
- **Jurisdictional Duty:** *they must consider jurisdiction proactively (CoA [58, 60-62]).*
- **Fee Clauses:** *enforceable absent bad faith.*
- **Bad Faith Standard:** *dishonesty/unconscionability, not error.*
- **Clear Terms:** *essential, especially post-PC Harrington.*

#### Parting Thoughts

Adjudicators may step away from disputes when jurisdiction is absent and still recover their fees, provided they act honestly. The Court of Appeal confirmed that "bad faith" is a high bar.

SWS's refusal to pay £4,290 produced litigation costing many times more, only to confirm that adjudicator terms mean what they say. The case reinforces: adjudicators can resign, get paid, and need not fear liability for honest jurisdictional decisions. The real lesson lies in clear terms of engagement and in avoiding disproportionate battles over modest invoices.

#### Authorities

##### Case Law:

- **Adjudicator's Entitlement to Fees and the Enforceability of Decisions**
  - **PC Harrington Contractors Ltd v Systech International Ltd** [\[2012\] EWCA Civ](#)

[1371](#); [\[2013\] BUSLR 970](#); [\[2013\] BLR 1](#) – Key Court of Appeal authority. An adjudicator is not entitled to fees where a decision is unenforceable due to breach of natural justice or misconduct. Distinguished between non-remuneration on resignation under Scheme para. 9(1) and potential entitlement in other circumstances. Suggested adjudicators protect themselves by drafting clear terms—an approach reflected in the current case.

- **Paul Jensen Ltd v Staveley Industries PLC (Unreported)** (para.10-27, 4<sup>th</sup> edition Coulson on Construction Adjudication) – Suggested entitlement to fees following resignation for jurisdictional reasons if no default or misconduct. The current case disagreed, holding that correctness in resigning does matter.
- **Cubitt Building and Interiors Ltd v Fleetglade Ltd** [\[2006\] EWHC 3413 \(TCC\)](#); [\(2006\) 110 Con LR 36](#) – Distinguished the adjudicator's broad commercial entitlement to fees from narrow instances where a decision was not delivered due to error (here, a failed email on the last day).
- **Adjudicator's Jurisdiction and Powers to Resign**
  - **Dacy Building Services v IDM Properties** [\[2017\] BLR 114](#) – No jurisdiction where arguably no contract, or wrong party named.
  - **M Hart Construction v Ideal Response Group (2018) 117 Con LR 228** – Confirmed lack of jurisdiction if the adjudicated party was not party to the underlying contract.
  - **Thomas-Frederic's (Construction) Limited v Keith Wilson** [\[2003\] EWCA Civ 1494](#); [\[2004\] BLR 23](#) – Adjudicator has no jurisdiction where a party is not under the contract. Enforcement may still follow if a party waives objection.
  - **The Project Consultancy Group v The Trustees of the Gray Trust** [\[1999\] BLR 377](#) – No jurisdiction without a qualifying construction contract.
  - **ROK Build Limited v Harris Wolf Developments Co. Limited** [\[2006\] EWHC 3573 \(TCC\)](#) – Decision unenforceable as claimant was arguably not a party to the contract.
  - **Estor Limited v Multifit (UK) Limited** [\[2009\] EWHC 2108 \(TCC\)](#); [\[2009\] 126 Con LR 40](#) – Decision unenforceable where defendant arguably not a party.
  - **Aedifice Partnership Ltd v Shah** [\[2010\] EWHC 2106 \(TCC\)](#); [\[2010\] CILL 2905](#) – Defendant may waive jurisdictional objections.
  - **Brims v A2M** [\[2013\] EWHC 3262 \(TCC\)](#) – Considered waiver depending on reservation of rights.
  - **Nordot Engineering Services Ltd v Siemens PLC (SF00901 TCC16/00) dated 14 April 2000; CILL September 2001** – Approved in Thomas-Frederic's: parties may agree ad-hoc adjudication enforceable even if one was not a contracting party.
  - **Primus Build Ltd v Pompey Centre Ltd and another** [\[2009\] EWHC 1487 \(TCC\)](#); [\[2009\] BLR 437](#) – Adjudicator may raise unaddressed points but must put them to the parties.
  - **Ex Novo Limited v MPS Housing Ltd** [\[2020\] EWHC 3804 \(TCC\)](#) – Cited regarding fact-finding and law ascertainment in adjudication.
- **Interpretation of Contractual Terms and 'Bad Faith'**
  - **Pakistan International Airline Corp v Times Travel (UK) Ltd** [\[2021\] UKSC 40](#); [\[2021\] 3 WLR 727](#) – Bad faith generally requires dishonesty or unconscionability.
  - **Yam Seng PTE Limited v International Trade Corporation Limited** [\[2013\] EWHC 111 \(QB\)](#); [\[2013\] 1 Lloyd's LR526](#) – “Bad faith” may include improper, commercially unacceptable, or unconscionable conduct, and departure from fidelity to the bargain.
  - **HIH Casualty v Chase Manhattan Bank** [\[2003\] 2 Lloyd's Rep 61](#) – Contracts assume

honesty and good faith unless expressly excluded.

- **Royal Brunei Airlines v Tan** [1995] 2 AC 378 – Objective test of good faith: whether conduct would be commercially unacceptable to reasonable and honest people.
- **General Principles of Contract Construction and Interpretation**
  - **Rainy Sky SA v Kookmin Bank** [2011] UKSC 50 – Apply unambiguous contractual language; avoid rewriting terms.
  - **Arnold v Britton** [2015] UKSC 36 – Emphasised primacy of wording and factual matrix.
  - **Woods v Capita Insurance Services Ltd** [2017] UKSC 24 – Reiterated construction principles.
  - **Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc** [2013] UKSC 3 – Reasonable construction must promote contract's purposes.
  - **Mackay v Dick** (1881) 6 App Cas 251, 263 – Implied duties of cooperation in performance.
- **Application of the Unfair Contract Terms Act (UCTA)**
  - **Paragon Finance PLC v Nash** [2001] EWCA Civ 1466; [2002] 1WLR 685 – Variable interest rate clauses regulate payment, not contractual performance; used to assess Clause 1 under UCTA.
- **Procedural and Miscellaneous Issues**
  - **Fenice Investments v Jerram Falkus Construction** [2011] EWHC 1678 (TCC) – Defendant relied on excessive fees argument; rejected.
  - **TRW Ltd v Panasonic Industry Europe GmbH** [2021] EWCA Civ 1558 – Cited on scope of permission to appeal.

## **Legislation & Rules:**

### **The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 649, as amended)**

- **Right to Resign:** Adjudicator may resign by notice, with no reason required. This unfettered right shaped UCTA analysis.
- **Jurisdiction and Duty:** Adjudicators must investigate jurisdictional issues if necessary, consistent with para. 13 powers to ascertain facts/law. Silence would undermine adjudication's efficiency.
- **Fees:** Entitlement in specific cessation situations (same/varied dispute; lack of competence). No express remuneration for resignation under para. 9(1). Fees otherwise payable as reasonably determined.
- **Liability:** Adjudicator not liable save for acts/omissions in bad faith.
- **Revocation:** If revoked for default/misconduct, no entitlement to fees.

### **Unfair Contract Terms Act 1977 (UCTA)**

- **Application to Fee Terms:** Court doubted s.3 applied, as clause regulated payment only.
- **Reasonableness:** Even if engaged, Clause 1 satisfied reasonableness given PC Harrington, prevalence of such terms, absence of bargaining inequality, and repeated acceptance with legal advice.

### **CIC Low Value Dispute Model Adjudication Procedure (1st Edition) (MAP)**

- **Contractual Precedence:** Subordinate to bespoke terms/appointment letter.
- **Resignation:** Adjudicator may resign on notice.
- **Fee Entitlement:** MAP denied fees if no decision; overridden by bespoke "cessation provision."
- **Fee Rate:** Fixed fees under MAP displaced by £325/hour rate once MAP ceased to apply.

### **Arbitration Act 1996**

- **Distinction from Adjudication:** Arbitrators' awards binding even if erroneous; adjudicators' unenforceable if jurisdictionally flawed.
- **Value of Prior Functions:** Arbitrators' anterior functions binding; adjudicators' preliminary work often of no discrete value.
- **Jurisdiction:** Arbitrators have inherent power to decide jurisdiction; adjudicators do not.

### **Legal Texts & Commentary:**

#### **Adjudication Law and Adjudicator's Role**

- Coulson on Construction Adjudication – Notes entitlement to fees on resignation by analogy with Scheme para. 9(4). Confirms adjudicators lack inherent power to decide their own jurisdiction (unlike arbitrators).

#### **General Principles of Contract Law and Interpretation**

- Chitty on Contracts (28th ed.) – Clauses altering performance (e.g. variable rates) unlikely to fall under UCTA s.3(2)(b); if they do, usually reasonable.
- Chitty (31st ed.) – Supports implied cooperation duties and assumption of honest dealing.
- Lewison, Interpretation of Contracts (7th ed.) – Specific terms prevail over general; relevant in reconciling documents in adjudicator's appointment.

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#ContractLaw #CaseLaw #LegalUpdate #CourtOfAppeal #TCC #BadFaith #UCTA  
#PCHarrington #SWS #SteveWardServices**

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FIDIC Adjudication Panel Member since 2021  
ICE Adjudication Panel Member since 2021  
RICS Dispute Board Registered since 2013

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