

ADJUDICATION: LIABILITY FOR OPPONENT'S COSTS?

- ▶ Is adjudication still fundamentally cost neutral, as Parliament intended, with the only costs risk being the unsuccessful party paying the adjudicator's costs?
- ▶ What is the impact in practice of *Lulu Construction Ltd v Mulalley & Co*?
- ▶ It is not yet clear whether the Courts will take the view that adjudication costs are recoverable by the successful party under the Late Payment Act of Commercial Debts (Interest) Act 1998 (Late Payment Act) as amended.

What's it about?

In *Lulu Construction Ltd v Mulalley & Co Limited* [2016] EWHC 1852 (TCC) the adjudicator awarded Lulu a sum including its "debt recovery costs" under sections 1(1) and 5A (3) of the Late Payment Act, as amended in March 2013, namely the costs of the adjudication. Mulalley paid the entire award, less the interest (which they later conceded was due) and the "debt recovery costs" of £47,666.27.

Enforcement proceedings were issued to recover the sums unpaid and the Court decided that "...such costs are clearly connected with and ancillary to the referred dispute and must properly be considered part of it. It follows, in my view, that the adjudicator was correct to say that he had jurisdiction to decide this element of the dispute...".

Despite the question before the Court being one of the adjudicator's jurisdiction (i.e. did the adjudicator have the power to decide to award the costs?), and not whether the adjudicator was correct in law to award the costs, many referring parties are now seeking to recover their adjudication legal costs under the Late Payment Act. This includes cases where it is even debatable that the Late Payment Act applies at all.

Why does it matter?

The Late Payment Act gives a statutory right to recover a fixed sum as "compensation arising out of late payment". If this sum does not meet the reasonable costs in recovering the debt, that party will also "*be entitled to a sum equivalent to the difference between the fixed sum and those costs*".

The Late Payment Act is not specific to the construction industry but covers all "debt" claims. The adjudication process (also a creature of statute) pre-dates the amended Late Payment Act by almost 15 years, having come into force on 1 May 1998 under the Housing Grants, Construction and Regeneration Act 1996 and having been amended in 2011 (**Construction Act**).

It is clear that Parliament intended that adjudication be a cost-neutral process with both parties bearing their own costs of the process (with the unsuccessful party generally paying the adjudicator's costs, because the Construction Act gives the adjudicator the power to award them). Indeed, s108A of the Construction Act renders "any contractual provision" which concerns 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. Further, paragraph 25 of the statutory Scheme for Construction Contracts (as amended), in order to align with the Construction Act, restricts the adjudicator's power to award his/her own costs unless the parties have opted in to a contractual provision under s108A(2); which parties would rarely ever do in practice.

So shouldn't the "provision" under the Late Payment Act be caught by the prohibition in the Construction Act which came into force before it and which specifically deals with adjudication costs? This has not, however, stopped referring parties from claiming the costs of adjudication under the Late Payment Act, or prevented adjudicators in some cases from awarding those costs.

Now what?

The substantive issue of recoverability of adjudication legal costs has recently been considered in *Wes Futures Ltd v Allen Wilson Construction Ltd* [2016] EWHC 2863 (TCC) in the context of the "cost of the proceedings" following acceptance of a Part 36 offer in litigation. The Court do not consider Lulu in this judgment. The Court in this case stated that "...in an ordinary case, a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it

incurred in the adjudication itself. That is because, pursuant to the Housing Grants (Construction and Regeneration) Act 1996, as amended, costs incurred in adjudications are not recoverable...".

Further clarification is required from the Court on this point, to re-assert one of the fundamental principles of the Construction Act, applying the "*Wes Futures*" (correct) analysis to the uncertainty which has been created by a misreading of what the *Lulu* decision actually decided.

Who to contact

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