

# Adjudication: guidance from recent cases

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*HENRY  
CONSTRUCTION  
PROJECTS LTD  
V PROMEP LTD  
[2024] EWHC  
1825 (TCC)*



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# BACKGROUND

- 25 October 2021: ProMep entered into a CVA (para 5).
- 23 November 2022: ProMep's Referral Notice. Claimed that Henry was in repudiatory breach of contract, which ProMep had accepted as terminating the contract. Promep claimed payment for work done and damages (para 20).
- Henry counterclaimed. ProMep argued that the counterclaim was settled by the CVA.
- Henry then submitted in the Rejoinder that ProMep's claim was settled by the CVA (para 23).
- ProMep summarised advice from counsel in the Surrejoinder that was said to support its position (para 24).

# BACKGROUND

- 5 January 2023: Adjudicator decided in ProMep's favour that Henry had repudiated the contract and that ProMep was entitled to be paid £90,380.49.
- Henry started Part 8 proceedings seeking a final determination of the issue as to whether the CVA settled all claims as between ProMep and Henry.
- ProMep started Part 7 proceedings to enforce the Adjudicator's decision.

# COUNSEL'S ADVICE

- Henry argued that there was a material misrepresentation of fact as to the contents of counsel's advice, that the Adjudicator relied on that representation and that was a ground for not enforcing his decision (para 40).
- Court found that the only way that could assist is if they were sufficient to give rise to an arguable defence that the decision was procured by fraud (para 41).
- However:
  - Counsel's advice is not evidence (para 42).
  - In any event, no arguable case that ProMep had fraudulently misrepresented counsel's advice (para 45). Summary before the Adjudicator contemplated that the ProMep claims might or might not be within the CVA (para 54).
  - Henry could have, but did not, raise the issue of whether the summary was clear in the adjudication. *SG South v Kingshead Cirencester LLP* [2009] EWHC 2645 (TCC).

## COUNSEL'S ADVICE

- Even if there was a misrepresentation of counsel's advice or ProMep's understanding of it, it was not material.
- *"At the risk of repetition, presenting an adjudicator with advice from counsel is a technique commonly adopted to persuade but no more than that...the adjudicator is simply being presented with a legal argument and had to reach his own decision on the law..." (para 62).*
- *"I do not go so far as to completely exclude the possibility that there may be circumstances in which a legal opinion is so badly misrepresented to an adjudicator that it is capable of amounting to fraud but such circumstances are extremely difficult to envision" (para 62).*



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ADJUDICATION**

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# THE ISSUE – CONCLUSIVE EVIDENCE PROVISIONS

- **JCT DB 2024:**

*"1.8.1. As from the due date for the final payment... the Final Statement... shall, except as provided in clauses 1.8.2 and 4.24.6 (and save in respect of fraud) have effect in any proceedings under or arising out of or in connection with this Contract (whether by adjudication, arbitration, or legal proceedings) **as conclusive evidence**..."*

*"1.8.2 The effects on the relevant statement specified in clauses 1.8.1 and 4.24.6 shall be suspended pending the conclusion of any adjudication, arbitration, or other proceedings, and shall be subject to the terms of any decision, award or judgment in and any settlement of those proceedings:*

*... where those proceedings are commenced before or within 28 days after the due date for the final payment..."*



# THE POLICY OF CONCLUSIVE EVIDENCE CLAUSES

- *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689
- *Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd* [2015] EWHC 70 (TCC)
  - Provide some limits to uncertainties and expense of arbitration and litigation.
  - **Conclusive evidence clauses** were devised "*to obviate cumbersome and painstaking enquiries to prove out-standings on running accounts...*".
  - **Conclusive evidence clauses** are intended "*to provide contractually agreed limits to the scope of disputes and to provide clarity as to the parties' obligations once a project is complete*".
- *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29

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- JCT DBSub/A 2011 contract, as amended.
- **19 December 2022** – QFS serves Notice of Adjudication respect of the calculation of the final sub-contract sum.
- **22 November 2022** - Final Payment Notice issued
- Parties agreed to extend time for the referral until at least 13 January 2023.
- **31 January 2023** – BPS ends 'waiver' on 3 February 2023.
- Settlement negotiations continue.
- **17 May 2023**: QFS serves same Notice again.

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*"1.8.2 If adjudication, arbitration or other proceedings are commenced:  
.1 by either Party prior to or within 10 days after the date of receipt  
of Final Payment Notice;*

*...*

*the Final Payment Notice shall not have the effects specified in clause 1.8.1 in  
relation to the subject matter of those proceedings **pending their conclusion.**  
Upon such conclusion, **the effect of the Final Payment Notice shall be subject  
to the terms of any decision, award or judgement in or settlement of such  
proceedings.**"*

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- BPS brought a Part 8 claim, QFS brought Part 7 enforcement proceedings.
- Lucy Garrett KC (Walker Morris) for BPS; Marion Smith KC and David Sawtell for QFS (Ward Hadaway).
- Alexander Nissen KC sitting as a High Court judge.

Question – what was the ‘conclusion’ of the adjudication?

- The lapse of the notice?
- The decision?

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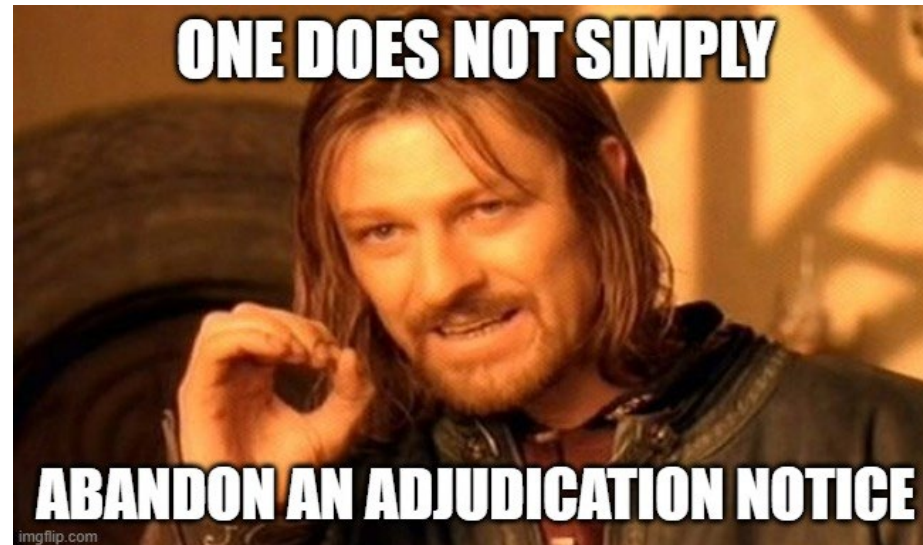
- *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC) – the saving provision is triggered once proceedings are ‘commenced’.
- If the proceedings then become a nullity, this is not a ‘conclusion’. The wording of the clause assumes that the proceedings conclude in either a decision or a settlement.
- The alternative interpretation could result in a harsh outcome e.g. if the adjudicator breaches natural justice.
- BUT – what about abandonment?

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- *Tracy Bennett v FMK Construction Ltd* [2005] EWHC 1268 (TCC)
  - if the referring party abandons adjudication proceedings by not pursuing them, then the saving provision ceases to apply.
- Did QFS abuse its timely commencement of proceedings either by lacking or losing any genuine intention to resolve the underlying dispute raised by the Notice?
- Objective analysis.
  - Did not serve a Referral because it erroneously concluded it did not need to.
  - Substantive negotiations between the parties.
  - QFS always made it clear that it intended to pursue the adjudication if a settlement was not reached.

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- Held that QFS did not abandon the adjudication proceedings.
- The Decision was enforced.



# ADJUDICATOR'S FEES





## *The principles*

- Adjudicator's fees: An adjudicator's decision as to liability to pay fees is final and is not subject to challenge in subsequent arbitration/litigation: **Castle Inns (Stirling) Ltd v Clark Contracts Ltd. [2005] Scot CS CSOH 178**
- Statutory interest under the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") applies to a debt created by virtue of an obligation under a contract. An award of damages for loss of profit was not such a debt: **National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013] EWHC 3025 (TCC)**.

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

## **Facts:**

- In proceedings C succeeded in overturning an adjudicator's decisions in favour of D. In the adjudication the adjudicator found against C and also awarded his fees and expenses to D, which decision the court had enforced earlier, including the award of the adjudicator's costs and expenses against C.
- C argued that D should [now the adjudicator's decision had been reversed] also be ordered to pay the fees and expenses. C Also claimed interest under the 1998 Act.
- D argued that the adjudicator's decision as to liability for fees and expenses was not reviewable, and also argued that the sub-contract provided for simple interest at 2% over base rate for late payment and that C acknowledged that that was a "substantial remedy" under s9 of the Act.

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

- **Judgment:**
- Case law in England supported the view that an adjudicator's decision as to liability to pay his fees was not reviewable: Coulson on Adjudication [10.25] and **Castle Inns (Stirling) Ltd v Clark Contracts Ltd. [2005] Scot CS CSOH 178** considered. There are arguments suggesting Castle Inns should be reconsidered, but as they were not pleaded, no order was made.
- C was entitled to statutory interest on its measured works claim at the statutory rate pursuant to the 1998 Act since the terms of the relevant sub-contract did not provide a substantial remedy for late payment so as to oust the application of the Act. Claims for interest on sums awarded as damages for loss of profit were rejected – they were not a qualifying debt under the Act (see National Museums and Galleries *ibid.*) Other claims were awarded simple interest at 4% over base rate.

# WHAT PARTIES CAN DO TO HELP AN ADJUDICATOR?



# WHAT PARTIES CAN DO TO HELP AN ADJUDICATOR?

1. Be collaborative (where possible)
2. Ask for what you want
3. Get good advice
4. Summarise and explain
5. Remember that more is not necessarily better
6. Try to avoid taking bad points
7. The importance of evidence

# THANK YOU FOR LISTENING!



## David Sawtell

39 Essex Chambers, 81 Chancery Lane,  
London WC2A 1DD

[david.sawtell@39essex.com](mailto:david.sawtell@39essex.com)

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