



Recovering Adjudication Costs

Lulu Construction Limited -v- Mulalley [2016]

Stefan Berry

Junior Associate

E: Stefan.Berry@QuiggGolden.com

T: +44 (0)28 9032 1022

On 17 March 2016 Mr Jonathon Acton-Davis QC, sitting as a Deputy Judge delivered a judgment in *Lulu Construction Limited v Mulalley & Co Limited* [2016] EWHC 1852 (TCC) which potentially provides a route for a party to an adjudication to recover their costs as against the other party. This runs contrary to the long accepted position that the only means by which adjudication costs could be recovered is through a written agreement of the parties made after the giving of notice of intention to refer the dispute to adjudication, per section 108A of the Housing Grants, Construction and Regeneration Act 1996 as amended (the "*Construction Act*"), which as can be expected happens in rare circumstances. The case also serves as a cautionary tale for parties who refer to adjudication a dispute regarding the valuation of a payment they are to make, that they may open themselves up to an award against them of the responding parties costs.

The origin of the dispute between Lulu Construction and Mulalley Co. occurred when Lulu, the Contractor made a claim against Mulalley, the Employer, in relation to disputed sums under the Contract. Mulalley answered Lulu's claim by issuing a Notice of Adjudication disputing the value of the claim. In their response to the referral Lulu set out their case in relation to the value of the claim but also claimed their adjudication costs from Mulalley under the Late Payment of Commercial Debts (Interest) Act 1998 (the "*Late Payment Act*").

The Late Payment Act implies a term into commercial contracts for the supply of goods and services, and thus into construction contracts, for payment of simple interest of 8% above the Bank of England's official rate for the late payment of commercial debts. It also provides for a fixed sum to be provided as compensation for late payment, in addition to the interest. These fixed sum compensation amounts are very small, to the point of being merely nominal. A maximum amount of £100 is available for debts over £10,000, with £70 available for debts between £1000 and £10,000 and £40 available for debts less than £1000. If the fixed sums are not sufficient the difference between the reasonable cost incurred in recovering the debt and the fixed sum may be claimed in addition to the interest.

The decision of the adjudicator was that Mulalley were to pay Lulu £240,324.77. Mulalley refused to pay £57,460.97 of the awarded sum which was made up of two elements: £47,666.27 accounted for Lulu's adjudication costs and the rest was made up accrued interest.

The case was then brought by Lulu Construction to enforce payment of this £57,460.97 the remainder having been paid within seven days of the adjudicator's decision.



England

Quigg Golden Solicitors
Central Court
25 Southampton Buildings
Chancery Lane
London WC2A 1AL

+44 (0)20 7022 2192
London@QuiggGolden.com

Quigg Golden Solicitors
1 Tonbridge Road
Maidstone
Kent ME16 8RL

+44 (0)1622 541 700
SouthEast@QuiggGolden.com

Ireland

Quigg Golden
31 Waterloo Road
Ballsbridge Dublin 4

+353 (0)1 676 6744
Dublin@QuiggGolden.com

Northern Ireland

Quigg Golden
18-22 Hill Street
Cathedral Quarter
Belfast BT1 2LA

+44 (0)28 9032 1022
Belfast@QuiggGolden.com

Kingdom of Saudi Arabia

Quigg Golden
P.O. Box 18623
Jeddah 21425
Saudi Arabia

+966 (0)2 651 8222
Jeddah@QuiggGolden.com

Given it is well established that Courts will uphold adjudicator's decisions even if they have reached the wrong conclusions as to the facts and/or law, provided they answered the correct question it was left for Mulalley to argue that the adjudicator did not have jurisdiction to award costs as it was not part of the referred dispute, especially given it was not raised by Lulu in their Response but at a later, further submission to the adjudicator.

It was decided that despite the claim not being part of the referral the Adjudicator did indeed have jurisdiction to award debt recovery costs as they were connected with and ancillary to the dispute and therefore must be properly considered as part of it. This decision was made by applying *Allied P& L Limited and Paradigm Housing Group Limited* [2009] EWHC 2890 (TCC) and reference is made to Akenhead J's judgment in this case outlining that the ambit of references to adjudicators may be inevitably widened by the response of the other party.

Notably given that the judgement concerned the Adjudicator's jurisdiction it is not a full endorsement that the Late Payment Act can be used to recover adjudication costs where the dispute being adjudicated relates to payment. It cannot be ignored that whilst s108A of the Construction Act applies only to contractual provisions within construction contracts the intention is clearly to limit the award of a parties adjudication costs to situations where it is agreed between the parties following the referral of the dispute. This clearly conflicts with the award of adjudication costs being made under the Late Payment Act. Given the judgement in this case is very short and makes limited reference to the adjudication it is not clear whether the adjudicator considered the Late Payment Act in light of s108A of the Construction Act and if he did a future case may establish that he reached the wrong conclusion. The moral of the case is therefore, in essence, "if you don't ask you don't get".

How then can paying parties prevent or mitigate the risk of having an award of adjudication costs being made against them? Firstly Section 5A(2A) the Late Payment Act allowing the potential recovery of adjudication costs only applies to contracts made on or after 16 March 2013 and it applies only to debts created by a requirement to pay the contract price (or part of it). Therefore, it appears claims for damages (amongst other things) will not come within this requirement. The aim of the Late Payment Act is to ensure commercial contracts include a proper remedy for the late payment of debt. It therefore, does not apply where the contract provides an alternative substantial remedy for the late payment of debt. This may take the form of another interest rate, by way of example the courts have held a rate of 0.5% over base rate was not a substantial remedy whereas a rate of 5% over base rate was a substantial contractual remedy. Therefore the simplest way to avoid the risk of having to having to pay the adjudication costs of a payee is to have a sensible interest rate agreed in the contract. This will ensure the Late Payment Act does not imply any terms allowing the recovery of adjudication costs.

It is also worth noting that the Late Payment Act has equivalent Irish legislation in the form of the European Communities (Late Payment in Commercial Transactions) Regulations 2012. Per Regulation 9(1) these Regulations also allow the recovery of costs incurred through the recovery of debt minus equivalent fixed sum amounts and thus the potential recovery of adjudication costs against the payer in a construction contract following the introduction of adjudication to Ireland through the Construction Contracts Act 2013.

As a final note it is also unclear post Brexit what the long term future is for this potential avenue for the recovery of adjudication costs given that the Late Payment Act has come about through EU legislation. As yet no clear plan has been provided as to how the Government plans to deal with the glut of EU legislation that is implemented into UK law.

