

RESERVED JUDGMENT : T.Grannum, Deputy District Judge, Leicester County Court. 18th July 2001

1. I reserved judgment on Thursday 12 July 2001 for want of court time and I agreed to give it in writing.
2. In this case the claimant (Mr. Green) seeks to recover payment of his fees for acting as an adjudicator in a dispute between the First and Second Defendants pursuant to the Housing Grants, Construction and Regeneration Act 1996 (the Act) and The Scheme for Construction Contracts (England and Wales) Regulations 1998. (The Scheme).
3. Mr Green appeared in person. Mr. Jupp of counsel represented the First Defendant. Mr. David Hagues, Managing Director appeared on behalf of the Second Defendant.
4. The court was provided with a bundle of documents from each of the parties. Statements were provided by Mr. Green and he further gave oral evidence to supplement his statements.
5. I received a statement from Mr. Paul Carrington Construction Manager of the First Defendant who also gave supplemental verbal evidence.
6. For the Second Defendant I heard oral evidence from Mr. David Hagues who also referred me to a letter of 25 June 2001 addressed to the court setting out the evidence for the Second Defendant.
7. At the commencement of the hearing Mr Green indicated that he wish to make an application to amend his Particulars of Claim to include a claim for legal expenses which he incurred in taking advice from counsel as a result of these proceedings. That application was considered later in the proceedings.
8. I set out below an outline of the position adopted by each of the parties in these proceedings.
9. Mr. Green claims that he is entitled to recover the sum of £1880 together with interest as set out in the Particulars of Claim and that both the First and Second Defendant are jointly and severally liable for his claim.
10. The First Defendant denies that it has any liability whatsoever for the sums claimed. The Second Defendant contends that liability for the claim falls entirely upon the First Defendant and that if it has any liability it is entitled to an indemnity from the First Defendant.
11. The history of the claim is that the First and Second Defendants entered into a contract whereby the Second Defendant was to supply and fit flooring cover, being vinyl and carpets to the Paddocks Hospital, Princes Risborough which was being refurbished. A dispute arose between the First and Second Defendants with regard to the non-payment or late payment of certain invoices by the First Defendant.
12. On 28 September 2000 the Second Defendant issued to the First Defendant a notice headed 'Notice of Intention to Refer Matters to Adjudication'.
13. Also on 28 September 2000 the Second Defendants submitted an application to the Academy of Construction Adjudicators for the appointment of a Registered Adjudicator.
14. On 29 September 2000 the Academy of Construction Adjudicators issued a notice to both Defendants appointing Mr. Green as the adjudicator.
15. On 29 September 2000 the Second Defendant signed a Deed of Appointment with Mr. Green which was headed 'Deed of Appointment of an ACA Adjudicator' appointing Mr. Green as adjudicator in the dispute with the First Defendants. The Deed provided that Mr Green would be paid fees at the rate of £75 per hour.
16. On 2 October 2000 Mr Green issued a letter to both the First and Second Defendants confirming that he was willing and able to act.
17. On 3 October 2000 the Second Defendant submitted to Mr. Green, as adjudicator, a letter headed 'Statement of Dispute' in which he detailed the issues in dispute.

18. The Issues for determination.

1. Is the contract between the First and Second Defendants one which falls within the Act and /or The Scheme?
2. Did the adjudicator act impartially as required by paragraph 12 of The Scheme?
3. If he did not act impartially, did it invalidate his decision and render his fees irrecoverable?
4. Are the fees determined by the adjudicator reasonable in amount.
5. Did the adjudicator reached his decision within the required period?
6. If not, what is the effect upon his decision and the recovery of his fees?
7. Should the Claimant, Mr. Green, be given leave to amend his statement of Claim?
8. If so, should the legal expenses incurred by Mr. Green in connection with these proceedings be recoverable under paragraph 25 of The Scheme?
9. Is the Second Defendant entitled to an indemnity against the First Defendant in respect of the fees, expenses, interest and cost of the adjudicator?

Is the contract within the Act or The Scheme?

- 19 Mr. Green argues that the dispute between the First and Second Defendants is one to which the Housing Grants, Construction and Regeneration Act 1996 and The Scheme for Construction Contracts (England and Wales) Regulations 1998 apply.
- 20 Section 108 (1) of the Act
'A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.'
(5) 'If the contract does not comply with the requirements of subsection (1) to (4) the adjudication provisions of the Scheme for Construction Contracts apply.'
- 21 Section 104(1) of the Act:
In this Part a "construction contract" means an agreement with a person for any of the following(a) the carrying out of construction operations;
- 22 Section 105(1) of the Act:
In this Part "construction operations" means subject as follows, operations of any of the following descriptions (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating,.....
- 23 It is common ground between the parties that the contract does not comply with subsections 1-4 of section 108 of the Act and that the Scheme applies to the contract by virtue of S.108(5), if it is a 'construction contract'.
- 24 Mr. Green contends that his appointment as Adjudicator was made pursuant to the Scheme and that he had jurisdiction to determine the dispute between the parties.
- 25 Mr. Jupp argues for the First Defendant that the contract relates to the laying of carpets and it does not amount to a construction contract within the meaning of S.104. Further that the definition of 'construction operation' would not fall within the definition contained in S.105.
- 26 Mr. Hagues' evidence on behalf of the Second Defendant is that he was required to carry out preparatory work to the floor of this hospital before fitting carpets . He also fitted vinyl to certain parts of the floor as part of the same contract. The quotation of 31 January 2000 which formed part of the contract between the First and Second Defendants contains full details of the works which the Second Defendant contracted to carry out.
- 27 I find that the works carried out by the Second Defendant were the 'installation in any buildingof fittings forming part of the land' within S.105 (1)(c) of the Act and were thus "construction operations" within the meaning of that section. It follows that as the Second Defendant carried out "construction operations" under the contract the contract is a construction contract as defined in S104 of the Act.
- 28 Mr. Green was entitled to be appointed as an adjudicator for the purposes of this contract dispute.
- 29 The Second Defendant do not contest the issue of jurisdiction as it initiated Mr. Green's appointment and subsequently executed a Deed of Appointment with him.

Did the adjudicator act impartially?

- 30 Paragraph 12 of The Scheme. The adjudicator shall
(a) *act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract*
(b) *avoid incurring unnecessary expense.*
- 31 The First Defendant contends that Mr. Green did not act impartially. As evidence of this, Mr. Carrington on behalf of the First Defendant referred to the first contact which he had with Mr. Green in which Mr. Green suggested that a meeting be held between the parties at the offices of the Second Defendant. He considered that this was an improper suggestion from Mr. Green.
- 32 Further in a telephone conversation with Mr Green on 17 October 2000 he was invited to a meeting with Mr Green at Hinckley and he informed Mr. Green that he wanted his Flooring Manager to accompany him. This request was refused because Mr. Green said that the Flooring Manager of the Second Defendant was on holiday and could not attend. Mr. Carrington considered this response to be unfair as Mr. Hagues the Managing Director of the Second Defendant was attending the meeting and he had specialist knowledge of flooring whereas Mr. Carrington had none.
- 33 Mr. Green did not fully explain his involvement in the dispute and it was only when he arrived at the meeting that he was told it was an adjudication meeting.
- 34 Finally Mr. Green's decision showed bias as he required him to pay all of the adjudicator's fees and expenses. Mr. Green's evidence is that he acted fairly and impartially. He made the suggestion that the meeting should take place at the premises of the Second Defendant at Derby because it was nearer to the First Defendant and appeared more convenient than requiring both Defendants to travel to Hinckley where he is based. The meeting subsequently took place in Hinckley at offices arranged by him.
- 35 I also note that Mr. Carrington was receiving legal advice from his solicitors on the matter.
- 36 To assist in considering the issue of bias Mr. Jupp drew my attention to a decision of the High court of 11 April 2001 in the case of **DISCAIN PROJECT SERVICES LTD. - V - OPECPRIME DEVELOPMENTS LTD.** That case contained at paragraph 40 a review by Judge Humphrey Lloyd of the authorities on the meaning of "*bias*" and my attention was drawn in particular to the following principle which the Judge summarised from the line of cases.
- 37 The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside.'
- 38 Applying this principle and having regard to the explanations given by Mr. Green, taking an objective appraisal of the facts I do not consider that there can be any legitimate fear that Mr. Green was biased. Accordingly I find no evidence of bias against the First Defendants on the part of Mr. Green.

Did the adjudicator reach his decision within the specified period?

- 39 Mr. Green accepts that under Paragraph 19 of The Scheme he is required to reach his decision no later than 28 days after the date of the 'referral notice'. He maintains that he did reach his decision within the specified time.
- 40 Mr Jupp submits that under Paragraph 19 (1) if the Adjudicator does not reach his decision within 28 days his decision is not binding. Mr. Jupp further refers to Mr. Greens letter of 4 October 2000 to the Defendants in which he refers to the '*Referral Notice dated 28 September 2000*'.
- 41 Paragraph 7 (1) of The Scheme:
Where an adjudicator has been selected in accordance with paragraphs 2, 5, or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing ("the referral notice") to the adjudicator.
- 42 It is common ground that the adjudicator was selected in accordance with Paragraph .5 of The Scheme.

- 43 The 'notice of adjudication' is defined in Paragraph. 1 of The Scheme. This provides that the 'notice of adjudication' is the notice given by the referring party of his intention to refer the dispute to adjudication. This document is document 12 within Mr. Green' bundle and is dated 28 September 2000 It is headed 'Notice of Intention to refer to Adjudication'
- 44 Under Paragraph 7 the referring party has 7 days from the date of the 'notice of adjudication' to refer the dispute to the adjudicator. It is this document which constitutes the 'referral notice'. The adjudicator then has 28 days (unless extended) from the date of the referral notice' within which to reach his decision.
- 45 I find that the adjudicator was not appointed until 29 September 2000. He told the parties of his appointment in his letter of 2 October 2000 and stated
"I now await the "Notice" and "Statement of Dispute" from the Applicant in order that the Adjudication can commence".
- 46 The Second Defendant who was also the referring party responded on 3 October 2000 by letter setting out the dispute.
- 47 This was the first document which referred the dispute to the adjudicator and I find that this document constitutes the 'referral notice' as defined in Paragraph 7 of The scheme. For the purposes of Paragraph 19 time began to run against the adjudicator from the date of the referral notice that is 3 October 2000.
- 48 Accordingly I find that the decision of the adjudicator was reached within 28 days of the date of the referral notice. The adjudicator's decision is dated 30 October 2000.

Were the fees and expenses of the adjudicator reasonable in amount?

- 49 Paragraph 25 of The Scheme
The adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
- 50 The Deed of Appointment between the Second Defendant and Mr. Green provides that he will be paid at £75 per hour. Mr. Green provided a schedule of time spent on the adjudication which he confirmed was accurate. This showed a total time of 26.33 hours at £75 per hour, producing total fees of £1974.75 (Excluding VAT). Additionally expenses of £25 were incurred (excluding VAT).
- 51 Mr Jupp argues for the defendant (that this time is excessive and out of proportion to the sum in dispute which was around £5000.
- 52 Mr. Green gave evidence that the invoice which he sent to the parties was abated by 5.33 hours and that his charges were reduced to £1575 for 21 hours. This is the sum L.-,which he now seeks to recover plus expenses of £25 and VAT.

Note – the Judge was aware that the only invoice that I sent to the parties had already been abated to 21 hours.

Witness statement 15/6/01 – paras 20 -22

- 53 Whilst I would have had some concerns about whether charges for the time of 26.33 hours recorded by Mr. Green were reasonable, I find that the time charged for 21 hours and hence total fees of £1575 are reasonable and accordingly I make no adjustment to his fees. There was no challenge to his expenses.

Claimant's application to amend his statement of claim.

- 54 I referred previously to an Application by Mr. Green in which he sought to amend his Particulars of Claim to include additional expenses which he incurred in seeking advice from counsel. The Application Notice was issued on 26 June 2001. Mr. Green and Mr. Jupp for the First Defendant addressed me upon the merits of the Application. Mr Green relies upon the advice of counsel that the need to take action to recover his fees as adjudicator, including legal expenses on taking advice are

reasonable expenses within Paragraph 25 of The Scheme. He therefore seeks to recover a further sum of £837.19.

55 Mr. Jupp contends that these are not legal expenses in the adjudication and that the adjudication finished when Mr. Green gave his decision on 30 October 2000. In any event he considers the amount of the fees to be excessive.

56 I grant leave for Mr. Green to amend his Particulars of Claim as requested.

57 Under Paragraph 25 of The Scheme the adjudicator is entitled to expenses reasonably incurred by him. I take this to mean expenses reasonably incurred in the adjudication. I agree with Mr Jupp's submission that the Mr. Green ended his role as adjudicator on 30 October 2000 when he gave his decision. The expenses relating to counsel's advice were incurred on 4 June 2001 and counsel's fee note was rendered on 22 June 2001. Accordingly I find that these were not expenses in the adjudication. These are expenses incurred solely for the purposes of bringing the current proceedings and subject to the provisions of The Civil Procedure Rules on small claims would ordinarily be an eligible item of costs in litigation. I find that these are not reasonable expenses under paragraph 25 of the Scheme.

Is the Second Defendant entitled to an indemnity against the First Defendant?

58 The Second Defendant has issued a Part 20 Claim and seeks indemnity from the First Defendant in respect of all or any part of the adjudicator's fees, expenses, interest and cost for which it has liability. It is within the power of the adjudicator under The Scheme to apportion liability for his fees and expenses but under Paragraph 25. notwithstanding such apportionment both parties remain jointly and severally liable for the adjudicators fees. In his adjudication Mr. Green decided that the First Defendant shall pay his fees and expenses.

59 I have found no reason to interfere with the decision made by the adjudicator and accordingly I grant the indemnity sought by the Second Defendant against the First Defendant.

60 The Decision

1. That the First and Second Defendants must jointly or severally pay to Mr Green ;

Fees, expenses & VAT of	£1880.00
Interest from 1 November to 12 July 2001 -(254 days)	£104.14
Costs	£115.00
Total	£2099.14
2. The total sum must be paid within 14 days.
3. The First Defendant must indemnify the Second Defendant in the sum of £2099.14 together with any other reasonable expenses which The Second Defendant may incur in discharging its liability to Mr. Green.