Recovery of your adjudication legal costs under the Late Payment of Commercial Debts (Interest) Act 1998? Think again!

Following the decision of the TCC last month in Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd [2017] (unreported), successful referring parties to adjudications may no longer be able to take advantage of the implied terms in the Late Payment of Commercial Debts Interest Act 1998 to seek to recover their legal costs.

The relevant legislation (a brief history)

The Housing Grants, Construction and Regeneration Act 1996 (*the Construction Act*) remained silent for a long time on the question of the allocation of legal costs in adjudications. As such, a presumption existed whereby the parties to adjudication would always be liable for their own costs regardless of the outcome of the adjudication.

However, in the 2000 decision of Bridgeway Construction Limited v Tolent Construction Limited [2000] CILL 1662; [2000] WL 1027055 the court held that there was nothing to prevent parties from making their own contractual arrangements as to who was to bear the legal costs of any adjudication notwithstanding the outcome of the adjudication (so called Tolent clauses).

**Section 108A of the Construction Act**

Tolent clauses were the focus of much debate, primarily over concerns that they fettered a party’s right to adjudicate at any time, and as such were in contravention of the Construction Act.


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Recently, parties started to argue that the Late Payment Act entitled a successful referring party to recover their legal costs of adjudication because Section 5A of the Late Payment Act, provides an implied term for a party to be paid the reasonable costs of recovering a debt.

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agreement by the parties concerning the allocation between them of legal costs relating to adjudication would be ineffective, unless the agreement was made in writing between the parties after the referring party had served a notice of intention to adjudicate on the responding party (Section 108A (2)(b)).

The Late Payment of Commercial Debts (Interest) Act 1998 ("the Late Payment Act")

Recently, parties started to argue that the Late Payment Act entitled a successful referring party to recover their legal costs of adjudication because Section 5A of the Late Payment Act, provides an implied term for a party to be paid the reasonable costs of recovering a debt. As such successful referring parties were arguing that, where there was no express provision in the construction contract for the successful party to recover interest on debts owed, Section 5A of the Late Payment Act entitled them to recover their reasonable 'legal' costs. Some adjudicators agreed that this implied statutory provision gave authority for the adjudicator to rule on the issue of legal costs, notwithstanding Section 108A of the Construction Act. Initially the Court upheld this position in Lulu Construction Limited v Mulalley & Co, but this was in stark contrast to Section 108A of the Construction Act.

The decision in Enviroflow Management Ltd v Redhill Works

The recent TCC decision in Enviroflow Management Ltd v Redhill Works seems now to provide some certainty to this situation.

The facts of the case are as follows.

+ In 2016, Redhill was awarded a contract as the Main Contractor on a project to carry out internet installation works. Redhill entered into a sub-contract with Enviroflow for part of the works. Works began in March 2016 and continued until the end of 2016 when a dispute arose as to payment.
+ The matter was referred to adjudication by Enviroflow. Enviroflow claimed they were owed money by Redhill.
+ The adjudicator awarded Enviroflow £81,000 plus interest and VAT. Enviroflow were also awarded its “reasonable costs” of recovering the debt under the Late Payment Act.
+ The issue on whether the adjudicator indeed had the jurisdiction to award Enviroflow its legal costs of the adjudication then came before the TCC.

As such the Court held that because no agreement in respect of payments of legal costs had been made in writing, the adjudicator lacked any jurisdiction to make a legal costs award.
The court noted that “Accordingly, by reason of the 1998 Act [the Late Payment Act], [Environflow] was entitled to seek its reasonable costs by reason of an implied term. However, such implied term was caught by section 108A of the 1996 Act [the Construction Act] and was ineffective unless an agreement had been made in writing”.

As such the Court held that because no agreement in respect of payments of legal costs had been made in writing, the adjudicator lacked any jurisdiction to make a legal costs award.

Comment

The provisions of the Construction Act make it clear that any agreement relating to the recovery of legal cost of adjudicating will need to be in writing and made after the notice of adjudication has been served, in order for it to be effective. Given the decision in Environflow Management Ltd v Redhill Works, successful referring parties who have not reached such an agreement in writing with the responding party will now seemingly not be able to take advantage of the implied terms under the Late Payment Act.

This recent TCC decision provides much needed clarification as to which statutory provision (i.e. Section 108A of the Construction Act or the implied provisions of Section 5A of the Late Payment Act) took precedence. It seems for the time being that the Construction Act is the winner!

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