

## Insights

# RECOVERING ADJUDICATORS' FEES AND INTEREST: RECENT GUIDANCE

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## SUMMARY

In this Insight, first published in PLC, Yorkie Fong considers the decision in *A&V Building Solution Ltd v J&B Hopkins Ltd [2024] EWHC 2295 (TCC)*, which clarified the binding nature of an adjudicator's decision on their fees and what constitutes a "substantial remedy" for interest under the Late Payment of Commercial Debts (Interest) Act 1998.

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The decision in *A&V Building Solution Ltd v J&B Hopkins Ltd [2024] EWHC 2295 (TCC)*, provides clarification on two issues, namely the binding nature of an adjudicator's decision on their fees and the interpretation of what constitutes a "substantial remedy" for interest under the Late Payment of Commercial Debts (Interest) Act 1998 (Late Payment Act 1998).

For more information, see [A&V Building Solutions Ltd v J&B Hopkins Ltd \[2024\] EWHC 2295 \(TCC\)](#).

## FACTUAL BACKGROUND

The dispute arose from a sub-contract under which the claimant (A&V) was hired to carry out plumbing works for a new student accommodation development for the University of Brighton. Relations between the parties soured. A&V left the project in March 2021 and the defendant (J&BH) engaged alternative labour to complete the sub-contract works. A&V subsequently submitted an application for payment of £211,773.60.

In the first adjudication, in November 2021, A&V sought payment based on its application and was awarded £138,010.86, which J&BH did not pay.

In a second adjudication, in June 2022, A&V claimed £455,526 in damages for alleged breaches of contract. This did not go well for A&V as the adjudicator decided that A&V had been overpaid,

ordering A&V to reimburse J&BH the sum of £82,956.88 along with paying his fees.

This was followed by proceedings in the Technology and Construction Court (TCC) and a series of judgments, including one that enforced the second adjudicator's decision but was subsequently stayed pending the later final account trial. This led to the decision in *A&V Building Solution Ltd v J&B Hopkins Ltd [2024] EWHC 1510 (TCC)*, where the court found that J&BH had committed a repudiatory breach of the contract and assessed that a further payment of £101,543.17 was due from J&BH to A&V.

For more information, see [\*A&V Building Solutions Ltd v J&B Hopkins Ltd \[2024\] EWHC 1510 \(TCC\)\*](#).

This left two issues to be determined. A&V argued:

- First, that because the court largely overturned the decision of the second adjudicator, J&BH should pay the adjudicator's fees.
- Secondly, that it should receive interest under the Late Payment Act 1998 in respect of the sum that the court ordered J&BH to pay to A&V.

## IS AN ADJUDICATOR'S DECISION ON FEES FINAL?

A&V argued that J&BH should bear the costs of the second adjudication because the court had effectively overturned that decision. J&BH argued that an adjudicator's decision as to liability to pay their fees was final and not subject to a final determination by the court.

J&BH relied on a decision of the Outer House of the Court of Session, *Castle Inns (Stirling) Ltd v Clark Contracts Ltd [2005] ScotCS CSOH 178*. In this case the court held that while the contractual mechanism allowed an indirect challenge, by court proceedings or arbitration, to the adjudicator's decision on any dispute submitted to him, that mechanism only relates to a "dispute". Any finding by the adjudicator on his own fees and expenses did not relate to the dispute but was merely an ancillary finding, and therefore could not be reconsidered by the court. In addition, the court noted the practical difficulty of reconsidering such decisions because adjudication, constrained by strict time limits, tends to produce quicker but less thorough decisions, whereas court proceedings allow for more detailed presentations and different arguments, complicating any assessment of the adjudicator's conclusions.

For more information about this decision and subsequent English and Scottish cases that have followed it, including *TSG Building Services plc v South Anglia Housing Ltd [2013] EWHC 1151 (TCC)*, *Halsbury Homes Ltd v Adam Architecture Ltd [2016] EWHC 1422 (TCC)* and *D McLaughlin & Sons Ltd v East Ayrshire Council [2021] CSOH 122*, see

- [\*Castle Inns \(Stirling\) Ltd v Clark Contracts Ltd \[2005\] ScotCS CSOH 178\*](#)

- *Practice note, Adjudication: an adjudicator's decision: Recovering adjudication costs in subsequent proceedings.*

On this basis, the court observed that there may be arguments to apply a different principle, but that this was not the case to do so. No order was made in respect of the adjudicator's fees.

## IS A CONTRACTUAL INTEREST RATE A SUBSTANTIAL REMEDY FOR LATE PAYMENT?

A&V also claimed interest on the judgment sum of £101,543.17 and the fees of the first adjudicator, using the current statutory rate under the Late Payment Act 1998 of 8% above the Bank of England base rate.

The court first agreed with J&BH that interest under the Late Payment Act 1998 could not be awarded for the loss of profits damages and adjudicator's fees. This was because they were not "qualifying debts" as stipulated under the Late Payment Act 1998, which are debts "created by virtue of an obligation under a contract", but rather debts arising from the court's judgment.

In respect of the remaining sum upon which interest under the Late Payment Act 1998 could be awarded (being the additional payment for the measured works) J&BH submitted that the applicable interest rate should be that stated in the sub-contract, which (under clause 12) was 2% over the Bank of England base rate.

J&BH submitted that this provided a substantial remedy because:

- The Bank of England base rate had been less than 1% for a substantial period before the subcontract was entered into.
- A&V acknowledged it was a substantial remedy.
- A rate of 1% to 3% above base rate is common.

The Court disagreed. It held that clause 12 did not provide a substantial remedy for the following reasons:

- J&BH's bargaining power was greater by a very substantial margin.
- Clause 12 was part of J&BH's standard terms, which practically meant A&V could either "take it or leave it".
- The express acknowledgement by A&V that such rate was a substantial remedy might only represent "competent drafting on the part of J&BH's lawyers", rather than a reflection of both parties' consideration of including an interest provision that ousted the Late Payment Act 1998.

- Although the court had to judge the issue at the time the sub-contract was entered into, ignoring the parties' behaviour in the subsequent adjudication process, the court considered that J&BH was never likely to be deterred from "playing procedural games in adjudications" by clause 12.
- The contract provision was one-sided – it only applied where J&BH failed to pay A&V, but there was no limit on the interest rate if A&V failed to pay J&BH.
- In a period of higher interest rates, and given the low interest rates when the clause was agreed, the fact that the interest rate remained fixed was a "one-way bet in J&BH's favour".

The court held that the applicable rate for the measured works would be the statutory rate under the Late Payment Act 1998. In respect of the loss of profits damages and adjudicator's fees, it held that simple interest at 4% over base was the fair rate to apply.

For more information about the Late Payments Act 1998, see Practice notes:

- [\*Interest under the Late Payment of Commercial Debts \(Interest\) Act 1998.\*](#)
- [\*Claiming interest in construction disputes.\*](#)

## COMMENTARY

The court's ruling that an adjudicator's fee allocation remains final and binding, even if a different decision is later reached on the underlying dispute, is consistent with existing case law. This outcome was not unexpected and provides certainty as to which party should bear the adjudicator's fees once their decision is issued. Notably, the court acknowledged there may be "arguments to suggest that *Castle Inns* should be reconsidered", but ultimately decided that this case was not the appropriate context for such reconsideration. The decision in *Castle Inns* was based on an analysis of the contract mechanism. If parties wish to avoid the adjudicator's decision on fees being final and binding, this should be explicitly addressed in the contract. This may be where *Castle Inns* can be departed from but the decision on interest highlights the risks of imposing terms on the other party.

In that respect, it is interesting that the court chose not to enforce what is a common provision as to interest, based on the lack of an equal bargaining position and the imposition of standard terms. This decision may well be limited to its facts, but the court's willingness to look at the wider circumstances and use that to decide what is a "substantial remedy" for the purposes of the Late Payment Act 1998 shows the limits of a written acknowledgment in the contract that an agreed rate constitutes a substantial remedy, all the more so when this is included in one party's standard terms and conditions.

## RELATED PRACTICE AREAS

- Commercial Construction & Engineering

## MEET THE TEAM



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