

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Adjudication: making false statements to the ANB

RNJM Ltd v Purpose Social Homes Ltd

[2025] EWHC 2224 (TCC)

RNJM sought summary enforcement of an adjudicator's decision in the sum of £132k. Relying on the principle in the case of *Eurocom v Siemens* (*Dispatch*, Issue 174), Purpose said that RNJM had "*deliberately or recklessly made a false statement*" in applying to the RICS for the nomination of an adjudicator, which meant that the application was invalid, and the adjudicator did not have jurisdiction.

HHJ Kelly summarised a number of relevant principles including:

- (i) If a false representation is made, in respect of an asserted conflict of interest when applying to an adjudicator nominating body, the resulting adjudication is invalid, and any decision is a nullity due to lack of jurisdiction of the adjudicator;
- (ii) It is irrelevant whether the adjudicator nominating body is deceived by the false representation or not;
- (iii) It is only if a potential adjudicator has a clear conflict of interest that the nominating body should be warned;
- (iv) The test for apparent bias is whether a fair-minded and informed observer, having considered all of the circumstances of the assertion that the adjudicator is biased, would conclude that there was a real possibility that the adjudicator is biased; and
- (v) The failure of a party to pay the costs of previous adjudications as directed by an adjudicator is an example of unreasonable and oppressive behaviour. An adjudicator's decision on allocation of their fees is final even if the decision on the dispute is subsequently overturned.

This was the fifth adjudication between the parties. The same adjudicator had been appointed in the second, third and fourth adjudications. That adjudicator found against RNJM in the third and fourth adjudications and ordered RNJM to pay their fees. RNJM did not comply, and the adjudicator wrote to both parties threatening legal proceedings as the parties were jointly and severally liable for their fees. Purpose paid those fees and wrote to RNJM asking why they had not done so themselves.

When RNJM started a fifth adjudication, they stated on the RICS nomination form that there was a conflict of interest between them and the previous adjudicator. The RICS has issued guidance on the point, which includes:

"Conflict of interest: An involvement between the dispute resolver and one of the parties, one of the parties and representatives or the subject matter of the dispute, or any other circumstances that raises justifiable doubts of bias or apparent bias."

Purpose's solicitors emailed the RICS stating that there was no conflict or dispute concerning the fees. The position was simply that RNJM had chosen not to discharge its liability to pay those fees when directed to do so by the adjudicator.

RNJM did not respond but a different adjudicator was appointed who found in favour of RNJM. The issue before HHJ Kelly was whether Purpose had a real prospect of successfully arguing that RNJM had deliberately or recklessly made a false statement when applying to the RICS for the appointment of an adjudicator for the fifth adjudication.

RNJM said, for the first time as part of the enforcement process, that they had a genuine belief that the payment dispute over the fees on the previous adjudications was a potential conflict. It was also reasonable that a fair-minded observer would conclude that the adjudicator would be biased.

Purpose highlighted that RNJM had never provided an adequate explanation for claiming that a dispute existed. There was no evidence or assertion that RNJM had disputed the fees with the adjudicator or challenged the underlying entitlements to them. RNJM simply did not pay them. Further, the adjudicator pursued both parties for payment of the fees. In fact, the only possible dispute over the fees was between RNJM and Purpose, since Purpose had already paid them.

In considering whether the information provided by Purpose was false, the judge examined the adequacy of the evidence given by RNJM. No one from RNJM explained why it was said that they were in dispute with the adjudicator. There was nothing beyond a bare assertion that there was such a dispute. RNJM never responded to requests from Purpose to identify the dispute.

Once the adjudicator's fees had been paid, the adjudicator had no fee dispute with either party. The judge said that it could not have mattered who paid the fees and, for all the adjudicator knew, there may have been an agreement in the background about the payment that was made.

As for apparent bias, RNJM said that there was a concern that the steps taken by the adjudicator to pursue payment of their fees "*constituted a risk*" that there would be a perception of apparent bias against them. It was therefore reasonable to set out those concerns in the nomination form.

The judge considered it relevant that there was no evidence of RNJM's advisors warning RNJM of the consequences of wrongly asserting that there was a conflict. Further, it was "*surprising*" that the potential conflict was described in such minimum detail on the form without any further explanation.

HHJ Kelly concluded that the evidence provided by RNJM was wholly inadequate to establish the nature or basis for asserting that there was an alleged dispute. The numerous questions raised by Purpose were legitimate. The fact that RNJM chose not to answer those questions or provide any evidence about the nature of the dispute was "*telling*" and those questions remained unresolved. As a consequence, the judge refused RNJM's application for summary judgment. Purpose had a realistic prospect of successfully arguing that the adjudicator lacked jurisdiction on the basis that RNJM had made a false statement about a conflict of interest on the adjudication referral form.

Adjudication: adjudicators' reasons

Clegg Food Projects Ltd v Prestige Car Direct Properties Ltd

[2025] EWHC 2173 (TCC)

Following practical completion, a dispute arose regarding the valuation of Clegg's application for payment 37. The disputed issues included the valuation of eight variations and Clegg's entitlement to extensions of time and prolongation costs. Following an adjudication, the two key issues before HHJ Kelly were:

1. Was the adjudicator in breach of natural justice by failing to go back to the parties and ask for further submissions when they decided to use a new "fair and reasonable" rate and a single new measurement in respect of the valuation of certain individual items when asked to provide a gross valuation of Application 37?
2. Did the adjudicator fail to provide adequate reasons for their decision including to explain the decision made on "fair and reasonable" rates?

By way of a reminder, the judge confirmed that not only must there have been a breach of the principles of natural justice, but any breach must also be material. HHJ Kelly also confirmed that:

"If issues have been fairly canvassed before an adjudicator, or if the adjudicator has simply adopted an intermediate position, fairness does not require the parties to be given an opportunity to make further submissions. An adjudicator is obliged to make a decision and come to conclusions based on the evidence of each party, his analysis of it and of the submissions put to him. He is not under an obligation to invite comments on his conclusions reached after that process."

Prestige said that there was a breach of natural justice because the adjudicator used their own rates and remeasured the work (using the documentation provided in respect of one of the variations) without informing the parties that they intended to do so and without giving them the opportunity to comment on the suitability of that approach. This breach was material because it was founded on a novel analysis of the materials. As such, if consulted, Prestige may have had a reasonable prospect of successfully objecting to the new approach. By choosing new rates, the adjudicator "made good" Clegg's case.

The adjudicator had ample opportunity seek submissions on the new rates and measurement. The fact that additional workings were provided by the adjudicator after the decision underlined that further explanation was required to enable the parties to understand the decision. Simply providing a list of numbers with an explanation that the adjudicator had decided upon a "new rate" was not sufficient to enable the parties to understand how those rates had been arrived at.

Clegg argued that the adjudicator was absolutely entitled to rely on their own knowledge and experience. The complaints about the new rates were "excessively granular" and were, in effect, a smokescreen intended to distract from the key facts. The adjudicator had been asked to provide a gross valuation of Application 37, which included the eight variations, each containing multiple items and sub-items.

One difficulty with Prestige's approach was that, without exception, the rates the adjudicator used to arrive at overall valuations for the variations were within the range established by the parties' contentions. Furthermore, in all but two cases, the use of the new rates was more advantageous to Prestige than at least one of the rates the adjudicator could have adopted without consultation – namely being Clegg's rate, Prestige's rate, or a crude "split the difference" rate.

The two exceptions resulted in an increase in the valuation of less than £2,600 or under 0.2% of the Relevant Changes. Those increases were vastly outweighed by more than £202,000 resulting from the adjudicator's use of the rates which were more favourable to Prestige than the rates the adjudicator could have adopted without further consultation. The use of new rates therefore had the overall effect of substantially reducing the amounts payable to Clegg.

The judge did not accept that there had been a breach of natural justice. Both parties had specifically invited the adjudicator to award either the amount each of them submitted for the gross valuation or "such other sums as the adjudicator shall see fit". The adjudicator was not tasked with making declarations on the individual rates to be used when valuing any sub-items. The decision they were asked to make was broader: the overall valuation of Application 37.

The adjudicator was not filling a gap in the evidence. Both parties had made submissions on rates, and the adjudicator did not rely on material that the parties instructed them not to consider. In addition, it was significant that each "fair and reasonable" value adopted by the adjudicator was either an intermediate position between those contended for by the parties or was more favourable to Prestige. Prestige had accepted that if the adjudicator had simply adopted either party's position on value or applied a crude "split the difference" rate, it could have no legitimate complaint.

The parties chose to instruct a Chartered Quantity Surveyor to assess their submissions. They provided the adjudicator with the materials needed to reach a valuation and the adjudicator provided a valuation within the range contended for by the parties, or which was more favourable to Prestige. It was not necessary for the adjudicator to set out the details of the methodology used to come to a decision.

Further, Prestige had not established that any breach, if proved, was material. Prestige accepted that the adjudicator could simply have adopted the rate proposed by them. Whilst, in respect of some sub-issues, the adjudicator's decision meant that the "fair and reasonable" rate was more favourable to Clegg than Prestige, that was not always the position. As Counsel for Clegg observed, Prestige could not: "properly complain that it lost an opportunity to persuade the adjudicator to order it to pay more than it was in fact ordered to pay".

Following a request by Prestige, the adjudicator provided additional workings. The judge commented that the fact the adjudicator later provided workings and answered questions about their reasoning, when asked directly, did not mean that the initial decision amounted to a failure to provide adequate reasons.

Further, there was sufficient detail in the 88-page decision to enable the parties to understand how the decision had been reached. The judge accepted that the reasons provided were broadbrush, with references to submissions and documents in footnotes. Fuller reasons could have been given, but that did not mean the reasons given were inadequate: "Detailed reasons, workings and explanations do not have to be given in respect of each individual sub item when the dispute put to the adjudicator is one concerning a global valuation".

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