

Lack of jurisdiction and an Adjudicator's right to resign

The recent Court of Appeal judgment in *Steve Ward Services (UK) Ltd v Davies & Davies Associates Ltd [2022]*¹ gives guidance to adjudication practitioners and parties as to the circumstances surrounding an adjudicator's right to resign in the context of him or her lacking jurisdiction, together with the right of the adjudicator to recover fees incurred.

Coulson LJ gave the leading judgment. The court upheld the first instance decision and allowed the adjudicator's cross-appeal. Coulson LJ upheld the first instance decision that the adjudicator was entitled to resign and that the adjudicator could rely on paragraph 9(1) of the Scheme² and resign at any time. Coulson LJ confirmed this was an unqualified entitlement and did not require the resignation to be for "good cause".

As paragraph 9(1) is silent, however, regarding the payment of fees, the question of the adjudicator's entitlement to his fees came down to why the adjudicator resigned (whether there was default or misconduct or bad faith) and an analysis of the terms of the adjudicator's appointment.

"Good cause" to resign

Coulson LJ found that in the circumstances of this case the adjudicator was entitled to resign. Coulson LJ confirmed that the adjudicator "*had good cause to do what he did*". Coulson LJ considered the adjudicator identified a real issue as to jurisdiction; one that was essentially fundamental to the entire adjudication. In those circumstances, Coulson LJ felt it was incumbent on the adjudicator to say something and not wait until the end of the process (i.e. not stay silent and leave the point to any disputed enforcement hearing).

If the adjudicator deems it necessary to consider whether they have jurisdiction to determine the dispute³, then he or she is bound to consider that issue and if necessary raise any issues with the parties.

The judge at first instance had suggested it would have been wiser for the adjudicator to have brought the issue of jurisdiction to the parties before he resigned. Coulson LJ agreed and suggested the adjudicator should have given the parties a final warning that he would resign unless there was an unequivocal acceptance of his jurisdiction.

Bad faith

On the question of whether the adjudicator acted in bad faith, Coulson LJ considered there was no bad faith and the adjudicator was entitled to be paid. Coulson LJ said that a finding of bad faith: "*... must involve some form of unconscionable or deliberately unacceptable conduct on the part of the adjudicator. It is more serious than simple default.*" Coulson LJ found this was not a situation, as in *PC Harrington Contractors Ltd v Systech International Ltd [2012]*⁴, when the matter was conducted by the adjudicator in such a way that the parties ended up with an unenforceable decision.

Paragraph 26 of the Scheme also deals with the difference between misconduct and bad faith (i.e. liability for the adjudicator's acts or omissions is excluded, unless there is also bad

¹ EWCA Civ 153

² Scheme for Construction Contracts 1998

³ Paragraph 13 of the Scheme allows an adjudicator to investigate matters necessary to determine the dispute

⁴ EWCA Civ 1371

faith). Coulson LJ found that this paragraph makes it plain that bad faith is more serious than simple default or misconduct.

Coulson LJ also pointed out that the Adjudicator in this case included a clause in his appointment which sought to overcome the result in *Harrington* (i.e. the parties could not avoid the payment of his fees on the basis of an inadvertent mistake on his part.)

Coulson LJ was clear that as the adjudicator was not guilty of default or misconduct, he undoubtedly was not guilty of bad faith.

Erroneous reasons for resigning

Coulson LJ found that the reasons given by the Adjudicator for resigning were not erroneous and allowed the adjudicator's cross-appeal. In doing so, Coulson LJ disagreed with the judge at first instance who he said was wrong to say the adjudicator's reasons were erroneous.

Comment

All adjudicators should follow Coulson LJ's advice and make enquiries of the parties when he or she believes there is an issue of jurisdiction – notwithstanding the issue is not raised by either party. If an adjudicator plans to resign, they should, in the interests of certainty, give a final warning to the parties.

From a parties perspective, vigilance in terms of jurisdiction remains paramount and the possibility of an adjudicator canvassing views on jurisdiction and the potential for subsequent resignation needs factoring into the already complex risk profile associated with adjudication.

Jonathan Shaw

Lamb Chambers

