

Bias in Adjudication – the Courts' Approach

In the quest for routes to resist enforcement of an Adjudicator's decision, parties often turn to the issue of bias of the Adjudicator as a potential ground.

The Court of Appeal decision in *In re Medicaments and Related Classes of Goods (No 2)* (2001) established the current test for bias. The issue which arose there was whether a lay member of the Restrictive Practices Court was biased. She had applied for a job with a consultancy firm, a director of which was an expert witness in a case she was involved in. The Appeal Court stated that what was required was first to ascertain all the circumstances which had a bearing on the suggestion of bias then to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or danger of bias. In this case it was thought there was such a danger. There was no suggestion of actual bias, the issue was an apprehension of bias. That test was approved in the later decision of *Porter v Magill* (2002).

The underlying principle is that the "*overriding public interest [is] that there should be confidence in the integrity of the administration of justice*" (per Lord Goff of Chieveley in *R v Gough*, 1993) or put another way "*that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (per Lord Hewart CJ in *R v Sussex Justices*, 1924).

There has been considerable judicial discussion of the various arguments related to bias being mounted as a defence to actions for the enforcement of Adjudicators' decisions.

For instance, is the Adjudicator biased if he is aware of a without prejudice settlement offer before issuing his Decision? This was the question put to Justice Coulson in the case of *Volker Sevin Limited v Holystone Contracts Limited* (September 2010).

Holystone argued that an Adjudicator's decision was unenforceable, amongst other things, because during the adjudication proceedings and before the decision, Volker had wrongly made the Adjudicator aware of Holystone's without prejudice offer of settlement. The without prejudice offer had been made at a meeting. Both parties made reference to the meeting during the course of the Adjudication but it was Volker who wrote to the Adjudicator to let him know that an offer to settle had been made at it. This, Holystone argued, was improper and resulted in the Adjudicator being (however unconsciously) biased against them.

In order to assess whether there was any bias, Justice Coulson applied the test established in *In Re Medicaments* and ultimately rejected Holystone's argument.

The Court found that there was no doubt that a fair-minded and informed observer would not reach the conclusion that there was a real possibility or danger of bias and any suggestion to the contrary was considered entirely unrealistic. The Adjudicator made clear in his Decision that he was indifferent to the fact that an offer had been made, and that the bulk of his decision had already completed by the time he was told about it.

In response to whether there was any unconscious bias, it was held that in any construction dispute, the Adjudicator, just like any Court judge, would tend to expect that negotiations had occurred. This was particularly so in this case where the question of liability had been dealt with in a previous Adjudication and the remaining issue was therefore how much was due.

Reference was also made to old arbitration cases, when the Arbitrator would be made aware of the existence of a sealed envelope containing a without prejudice offer. There was no suggestion that the Arbitrator in those cases was biased as a result of his knowledge of the fact that an offer was made.

In an earlier case, *Specialist Ceiling Services Northern Limited v ZVI Construction* (2004), the Adjudicator had been made aware of the existence of a without prejudice offer to settle and the fact that a breakdown accompanied this offer (although he did not see the breakdown). In that case, liability was still in dispute. The Adjudicator declined to resign on the basis that he did not consider his impartiality was affected by this knowledge. He expected without prejudice negotiations to occur and noted that in his experience, offers were often made for commercial reasons to avoid the need for Adjudication and not necessarily due to any admission that sums were due. In that case also it was found that there was no indication of bias or unfairness in the Adjudicator's decision and the decision was enforced.

A different issue arose in *Fileturn Ltd v Royal Garden Hotel Ltd* (July 2010). There, an application for enforcement of an Adjudicator's decision was resisted on the basis that the Adjudicator had been a director (in 2001 – 2004) of the firm of claim consultants who were representing Fileturn in the Adjudication. The individual representing Fileturn was also a director of the firm at that time. Further, there were around 10 Adjudications (out of 250 the Adjudicator had conducted) where he had acted as Adjudicator when his previous firm were acting for a party. On 12 occasions, the firm had requested that particular Adjudicator's appointment.

The court found that the Adjudicator had not known of the requests made for his appointment. Further, the number of occasions on which the Adjudicator had acted when his previous firm was involved was only a small proportion of his practice and he therefore did not depend on that business. The Adjudicator had had no interest in his previous firm since 2004. Further, the court saw no difficulty with representatives of parties being well known to the decision maker whether that be a judge or Adjudicator. In specialist courts like the TCC this is a frequent occurrence. Adjudicators are professional people with their own codes of conduct and that should not present a problem.

Taking account of the above, it was considered "*inherently unlikely*" that a fair minded and informed observer would conclude that the Adjudicator's involvement with the firm 6 years earlier would give rise to bias. In fact the court considered this to be "*fanciful speculation*".

In *Makers UK Limited v The Mayor and Burgesses of the London Borough of Camden* (2008) the allegation was of apparent bias due to a telephone call having taken place with the Adjudicator to check his availability to act. An application was then made to the RIBA suggesting the Adjudicator be appointed, if available. The court found no apparent bias in this case but did suggest that, as practical guidance, parties and Adjudicators should limit unilateral contact before, during and after an Adjudication due to the potential of any such contact being misconstrued. If there is any such contact, it is better to be in writing rather than verbal. Nominating bodies should consider their rules about whether they will accept suggestions if nominees

from parties and, if so, whether notice of the suggestions should be given to the other party.

In *AMEC Capital Projects v Whitefriars City Estates* (2004) the allegation was of apparent bias based on the Adjudicator having previously made a decision on the same issue. This was not upheld and it was said there needed to be something of substance to lead to the conclusion that there is bias.

The Courts' default position in disputes concerning enforcement of Adjudicators' decisions is to enforce and it tends to be an uphill struggle to convince them otherwise. To succeed in relation to bias will require clear factual evidence supporting the allegation as well as a clear apprehension, on reasonable grounds, of potential bias. It is evident that the courts are giving short shrift to what they regard to be spurious allegations of bias in an attempt to avoid enforcement.

Shona Frame is a Partner at MacRoberts. She is accredited by the Law Society of Scotland as a Specialist in Construction Law. She can be contacted on shona.frame@macroberts.com

Fritha Wheeler-Ozanne is a Solicitor at MacRoberts. She can be contacted on fritha.wheeler-ozanne@macroberts.com

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