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Tolent Contest Fails To Remove X-Factor

In a blow to referring parties in adjudications, the Scottish Courts have ruled in *Profile Projects v. Elmwood* that so called "Tolent clauses" which provide for the referring party to pay both parties' costs of the adjudication, win or lose, will be upheld.

This has long been controversial. The first case was *Bridgeway v. Tolent* in 2000, where such clauses were approved as not being contrary to the provisions of the Housing Grants, Construction and Regeneration Act 1996 (the “1996 Act”).

More recently, in *Yuanda v. Gear* in 2010, these clauses were held to be ineffective as they acted as such a disincentive to adjudicating that they were contrary to the 1996 Act's provision allowing parties to adjudicate at any time.

The provision in Profile Projects' contract stated*: “the referring party shall bear the whole costs of the adjudication including, but not limited to, the Adjudicator's fees and costs in their entirety and both parties' legal expenses (on a solicitor client basis and upon the scale of charges applicable to Court of Session business) in and incidental to the adjudication...”*

This clause was found not to be incompatible with the 1996 Act. The judge considered that if Parliament had wanted to make provisions regarding allocation of costs in adjudication, it could have done so. In fact, it had since done just that in the new Local Democracy, Economic Development and Construction Act 2009 (the “2009 Act”) (likely to come into force from 1 October 2011). Other factors were that either party to the contract could be referring party so the clause did not discriminate and the clause did provide for a reasonableness test given the reference to the Court scale of charges.

Interestingly, although not strictly necessary in reaching his decision, the judge commented on his interpretation of the 2009 Act, despite it not yet being in force. He said the Act makes it a requirement that if a contract makes provision for allocation of costs in adjudication, this must meet certain conditions. Tolent clauses will be ineffective unless (i) made in writing, contained in the contract and allowing the adjudicator to allocate his own fees and expenses between the parties or (ii) agreed in writing after the notice of adjudication is served. As long as these conditions are met, the judge accepted that parties would remain free to provide for the referring party to pay both parties' legal and other costs.

The judge considered the aim of the 2009 Act was to prevent the party with greater clout from using the costs of the adjudication process as a barrier. It was intended to improve the lot of referring parties by only allowing such clauses in certain circumstances. If the *Yuanda* position was correct and such clauses were already banned under the 1996 Act, then the 2009 Act would be a backward step which was the opposite of what Parliament intended. The current law, he considered, was that such clauses were allowable.

Commentary

This result is perhaps a quirk of timing. At the time of the 2009 Act, the law was based on the *Tolent* case, allowing such clauses unconditionally. An Act allowing them only in certain circumstances did, therefore, constitute an improvement.

However, the *Yuanda* case followed (after the 2009 Act) in 2010. It went to the other extreme and found such clauses to be unacceptable.

What we now have in the 2009 Act, if the above interpretation is correct, is a better position for referring parties than under *Tolent* in 2000, but a step backwards from *Yuanda* in 2010. It remains to be seen whether the *Profile Projects* approach will be followed, given that many commentators consider that Parliament intended to ban *Tolent* clauses outright, with the unusual wording of the 2009 Act being the result of a drafting anomaly.

Whatever the explanation, there is no doubt that a clause like this will make a party (most likely to be a contractor or subcontractor seeking payment) think twice before raising an adjudication given the increased costs this will involve. In the current economic climate, with cash flow being even more of a concern than ever, that can only be regarded as unwelcome.

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This article appeared in the Summer 2011 issue of Urban Realm.

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