

# Adjudication in 2020

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Fenwick Elliott Webinar

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# Today's Agenda

- Getting the formalities right
- Will the court still allow an insolvent company to start an adjudication?
- The things adjudicators do
- Paying the adjudicator's fees
- The impact of the C-19 crisis on adjudication and adjudication enforcement
- Is it (adjudication) business as usual?
- Adjudication in May 2020 and beyond.

# Getting started: getting the formalities right



# *Flexidig Ltd v M&M Contractors (Europe) Ltd* [2020] EWHC 847 (TCC)

- Adjudication notice sent on 20 November 2019;
- Adjudicator received the Referral on 29 November 2019;
- Referral out of time?
- For the dispute to be referred to adjudication, the adjudicator must have received the referral;
- Time does not run until the addressee receives or is deemed to receive the notice.

# Getting started: the insolvent referring party



## The position after *Bresco* and *Meadowside*

- No absolute jurisdictional bar to an insolvent adjudication claimant holding an adjudication;
- Provided you can reach a position where the ultimate mutual account could be reached as a result of the adjudication;
- If you cannot do this, it would be futile or pointless;
- BUT, security will be required by the party resisting the adjudication in the event of underlying litigation taking place;
- Any adjudication will be the exception not the norm.

*Balfour Beatty Civil Engineering Ltd & Anr v Astec Projects Ltd (in liquidation)*, [2020] EWHC 796 (TCC) **FENWICK  
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- Following the adjudication decisions, BB has 6 months to bring a claim;
- If BB does that, stay on Astec seeking to enforce the decisions;
- Any stay on enforcement of the adjudicator's decisions would become permanent if Astec's claims in the litigation came to a premature end, i.e. if insurers pulled the funding;
- The adjudication fees will be the subject of security and BB is entitled to security for costs of £250k per subcontract.

# The things adjudicators do





- The traditional “without prejudice” rule, based on public policy, is that parties should not be discouraged, when negotiating, by the knowledge that anything they may say may be used against them, in the course of any court proceedings.
- The question of the admissibility of the “without prejudice” letters was one which the adjudicator had to decide as one of the central issues in the adjudication.
- It could not be said that *“the submission of the letters to the adjudicator, or the way in which he dealt with them, was in any way improper or involved any breach of natural justice or apparent bias”*.

# Adjudicators doing their own thing




# *Platform Interior Solutions Ltd v ISG Construction Ltd*, [2020] EWHC 945 (TCC)

- What happens, if an adjudicator decides a matter of contractual interpretation in a way not contended for by either party?
- A breach of natural justice?

*“no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator.”*

*Roe Brickwork Ltd v Wates Construction Ltd*

Do I have to pay the  
adjudicator, even if I am  
challenging enforcement?



# *Platform Interior Solutions Ltd v ISG Construction Ltd*, [2020] EWHC 945 (TCC)

- Paying the adjudicator's fees;
- *“As a matter of policy, it seems to me that this court should not do anything to discourage payment to an adjudicator of fees for the adjudicator's work. Thus, where the alleged election is payment of an adjudicator's fees, the court should perhaps be particularly careful to see whether the inference should properly be drawn that the payer intended to treat the decision as valid.”*

# Obtaining a stay in the time of COVID-19/Impact of COVID-19



# *Broseley London Ltd v Prime Asset Management Ltd*, [2020] EWHC 944 (TCC)

- Paragraph 17.28 of Coulson on Construction Adjudication: *“a failure by the defendant to pursue its cross-claim or challenge with diligence may itself be a bar to a successful application for a stay of execution”*.
- *“if PAML had moved with due diligence and in accordance with S & T, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on my findings, have been able to repay”*.

# Adjudicating in the time of COVID-19





# *MillChris Developments Ltd v Waters* [2020] 4 WLUK 45

- Adjudication business should, by and large, continue as usual;
- Timetable;
- Site visit;
- Virtual hearing;
- The TCC, as always, will expect parties to be sensible, practical and take reasonable steps to ensure that adjudications can proceed in line with the lockdown measures that currently apply.

# Looking forward: adjudication in May 2020



# Adjudication in the future/Low value adjudications

- 21 June 2019, TeCSA LVD Scheme;
- 1 May 2020, CIC Low Value Disputes Model Adjudication Procedure;
- RICS – launching a fixed fee 15-day adjudication service;
- CIC COVID-19 Contractual Best Practice Guidance:

*“In particular, parties are encouraged to act fairly and reasonably when administering contracts and agreeing variations, given the impact of COVID-19.”*

# Questions?

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