

## Three Times a Lady

OCTOBER 29, 2024



Last week's judgment of HHJ Stephen Davies in **Workman Properties Limited v ADI Building and Refurbishment Limited [2024] EWHC 2627 (TCC)** was timely for a number of reasons, not least because I was planning to share my thoughts on the increased use of Part 8 claims in order to "trump" an adjudicator's decision and the uptick of serial adjudications.

By way of background, Workman entered into a JCT 2016 Design & Build Contract with ADI for the construction of a dairy in Tewksbury. There was a dispute between the parties regarding whether Workman had warranted that the design in the Employer's Requirements had been developed to RIBA Stage 4. ADI referred that matter to adjudication. The adjudicator reached his decision on 23<sup>rd</sup> September 2023 and found in ADI's favour ("Adjudication No.1).

Subsequently, Workman issued a Part 8 claim in the TCC in London which sought a final determination of the question of whether Workman had warranted the design. The application was resisted by ADI on the grounds that the case was unsuitable for the Part 8 procedure because it raised disputed factual issues. In the meantime (on 1<sup>st</sup> May 2024), ADI commenced a second adjudication in respect of payment claim disputes which included a claim for an extension of time and payment of £8.5m, including £6.5m of loss and expense and which relied to a certain extent on the decision in Adjudication No.1. A different adjudicator was appointed and he proceeded to reach his decision (as corrected) on 19<sup>th</sup> August 2024 ("Adjudication No.2"). The second adjudicator decided that he was bound by the first adjudicator's decision in Adjudication No.1 which resulted in him awarding some extension of time and circa £1.6m loss and expense which was, at least partly, based on the decision in Adjudication No.1.

The hearing in the Part 8 claim was heard on 8<sup>th</sup> October 2024, the Judge circulated his draft judgment on 15<sup>th</sup> October 2024 and handed down the approved judgment on 21<sup>st</sup> October 2024. The Judge rejected ADI's arguments on the lack of suitability for the claim to be dealt with by the Part 8 procedure and therefore proceeded to address the contractual interpretation point which had been addressed in Adjudication No.1. He reached a different conclusion to the first adjudicator on the contractual interpretation point, finding in Workman's favour, which effectively reversed the decision in Adjudication No.1. Although the Judge made it clear that he hadn't considered the effect this would have on the decision in Adjudication No.2, it would appear that it would have rendered at least some of the decision in Adjudication No.2 otiose.

Of note for the lawyers are the points regarding choice of venue and the fact that, in his view, had the proceedings been issued in the TCC in Birmingham or Bristol, the judgment would have been handed

down prior to commencement of Adjudication No.2.

## My Observations

Two points struck me in relation to the judgment and which rang true with my thoughts as to recent trends. The first was the increased use of serial adjudications and (perhaps) a move away from the “kitchen sink” type adjudications. The second was the increased use of Part 8 claims in an attempt by parties to trump adjudicators’ decisions. Notable reported cases involving serial adjudications are **Sudlows Limited v Global Switch Estates Limited [2023] EWCA Civ 813** from July of last year (which involved the fifth and sixth adjudications between the parties), **Battersea Project Phase 2 Development Company Limited v QFS Scaffolding Limited [2024] EWHC 591 (TCC)** in March of this year (which concerned the eleventh in a series of adjudication), **ISG Retail Limited v FK Construction Limited [2024] EWHC 878 (TCC)** in April of this year, which recorded that the parties had been involved in 12 adjudications, eight sets of High Court proceedings, two trips to the Court of Appeal and an unsuccessful attempt to use a Part 8 claim to trump an adjudicator’s decision.

## Serial Adjudications and Part 8

The observant amongst you will have noted that I was involved with some of the reported cases involving serial adjudications. I can attest to the fact that there have been more, as I am sure others can. I also note that the judgment in **Beck Interiors Limited v Eros Limited [2024] EWHC 2084 (TCC)**, reached on 28<sup>th</sup> June 2024 (but only became available recently) concerned an unsuccessful attempt by Beck to obtain an injunction against Eros from continuing with four adjudications commenced in May 2024 and to refrain from commencing any more.

If my experience is reflective of that of others then I consider it fair to say that there has been an increased use of serial adjudications and also the use of Part 8 proceedings over the past 19 months. I am sure that this is not coincidental. In my view, parties, no doubt advised by their representatives, are seeking to manage the risk of an adverse decision by an adjudicator by seeking to craft their referrals to adjudication in such a way that it may be possible to avoid the consequences of a decision going against them by referring discrete questions to the TCC by way of a Part 8 claim. Workman is a good example of that. However parties would be wise to take note of the Judge’s comments in the ISG case regarding the appropriate use of Part 8 and HHJ Davies’ comments at the end of the judgment regarding choice of TCC venue:-

*“Had the claimant's legal representatives had regard to this guidance they could and should have issued this claim in either the Birmingham or the Bristol TCC. Had they done so then they would, ironically, almost certainly have had this Part 8 claim finally determined well before the second adjudication decision of Mr Eyre was promulgated. Issuing claims in the most appropriate TCC location also has the benefit of reducing the workload of the London TCC and, thus, enabling cases which ought properly to proceed there being determined more speedily.”*

Circling back to the title of this blog, **Three Times a Lady**, if the Commodores are thinking of releasing a remastered version of their 70’s classic, they may consider renaming it **Eight Times a Lady** or perhaps, sometimes, less is more.

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