

Conflicts of Interest in Adjudication; How Remote is Remote?

It is not usual for an adjudicator to have to resign due to conflicts of interest. An adjudicator will normally address any conflicts of interest before accepting the appointment. A conflict of interest is where the adjudicator has an interest in multiple activities where one of these activities could motivate or corrupt a decision which affects the other. If the adjudicator does not clearly announce any conflicts of interest than a party can claim the award to be invalid on basis of apparent bias and a breach of natural justice, and the award may not be enforceable in court.

A conflict of interest does not automatically prevent the adjudicator from continuing in the adjudication, providing the adjudicator has made clear the conflict of interest and the parties have agreed to let adjudicator continue than the award made is enforceable. The adjudicator could of course just decide to ignore the conflict of interest or he may decide the conflict is remote and will not affect his unbiased objectivity in making his award. If this is the case how remote is remote?

For the purpose of the article the Referring party (the main contractor) will be known as 'MC', the Responding party (a subcontractor) as 'SubC', the adjudicator simply as the 'Adjudicator' and the architect as the 'Architect'.

To set the background; SubC, a subcontractor, undertook screeding work for MC, the main contractor, and the work was defective. MC claimed the cost of the remedial works was the liability of SubC as the failure was a latent defect:

- The Adjudicator was appointed and the Referral was received, and
- seven days later the Response to the Referral was received.

Now for the twist:

- The Architect was a client of the adjudicator's firm, but there was no direct working relationship.
- The Architect only worked with the quantity surveying arm of the firm.
- The Referral made no remarks regarding the architect or his performance.
- However, the Response questioned the specification.
- MC indicated they did not believe the architect to be involved the matter.

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- When asked directly, SubC confirmed they were questioning the architect and the specification. The adjudicator offered his resignation and both parties agreed with this, so the Adjudicator resigned.

So, was the adjudicator correct in offering his resignation, and what is the proximity of relationship to determine a conflict of interest?

The Scheme for Construction Contracts (England and Wales) Regulations 1998 states the following

“4. Any person requested or selected to act as adjudicator in accordance with paragraphs 2, 5 or 6 shall be a natural person acting in his personal capacity. A person requested or selected to act as an adjudicator shall not be an employee of any of the parties to the dispute and shall declare any interest, financial or otherwise, in any matter relating to the dispute.”

The ‘Scheme’ therefore makes it clear that the adjudicator should make any conflicts of interest clear from the outset. There is not however, any mention of how close this relationship has to be. How are conflicts of interest dealt with in other forms of dispute resolution, for example arbitration. Could the adjudication process learn from arbitration? There is a document titled ‘The International Bar Association Guidelines on Conflict of Interest in International Arbitration’. What this document does is break down conflicts of interests in the following areas;

- Non-waivable red list (reject appointment)
- Waivable red list (advise parties on the conflict, if they agree for you to carry on then accept the appointment).
- Orange list (Disclose relevant facts and circumstances to the parties, await comments then accept appointment)
- Green list (no duty to disclose, accept appointment).

It then provides a flow chart of self answers questions to determine if the adjudicator accepts the appointment or not.

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