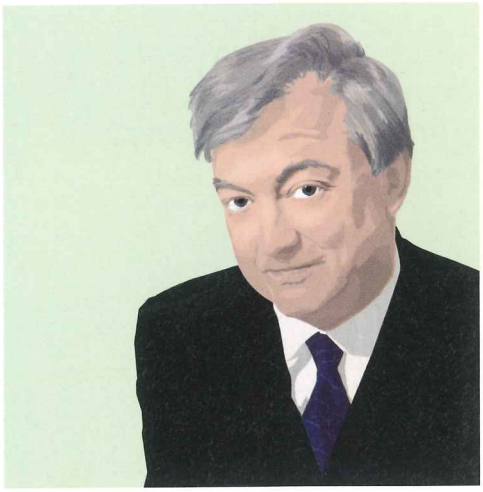


Tony Bingham **Some people chomp at the bit to get their case to court. Here's the case of a construction company that went three times and won them all – but at what cost**

JUMPERS!

IT'S EASY TO FATHOM WHY DAWS WOULDN'T GIVE THE TIME OF DAY TO TREASURE, NEVER MIND EXPLAIN WHY HIS BELOVED DAUGHTER PAID HIS BILLS. I BET HE WAS SHOUTING, 'NONE OF YOUR DAMNED BUSINESS'

This is an extremely unusual dispute. I remain in some doubt as to how and why such a dispute has been allowed to get this far and I question the underlying tactical considerations, which I cannot begin to fathom, that could be said to justify the extensive costs that these applications have engendered." And there isn't much that Mr Justice Coulson cannot begin to fathom.

I told you about the case of Martin Daws, the owner of Dinmore Manor, and construction company Treasure & Son at the end of last year (30 November, page 60). Mr Daws wanted to produce a world class stud facility for showjumping horses. Treasure's final account was in the order of £15m. It was, and still is, the final million that is in dispute. The first round was won by the contractor because the adjudicator awarded it the £1m. That million pound payment stalled, so the court last year ordered payment. Mr Daws stumped up. Well, er, that's not quite true. On checking, Treasure discovered that the sum had come from the account of Hayley Daws, Mr Daws' daughter. Treasure, despite having the £1m cheque in its hands, began to fret. It wanted an explanation. It didn't get one.

So, these two parties are in dispute. It's ever so easy to fathom why Martin Daws wouldn't give the time of day to Treasure, never mind explain to it why his daughter paid his bill. I bet he was shouting, "none of your damned business". In a cooler moment it would only have taken a couple of letters to explain that Hayley Daws was acting as agent for her dad. But Treasure wanted certainty. Yes, it began another court action. This time Treasure sought a judge's declaration confirming that this cheque satisfied the adjudicator's order and the High Court enforcement.

Now then. There are at least two great big snags about engaging with the English legal system. First, I have never heard of a knockdown absolutely certain winner of a case. Second, lose in the court and you are in

Jonathan Cope **Consultants should be aware of the full range of tools at their disposal for recovering their fees. Adjudication offers a possible alternative to traditional methods**

WISHING YOU A SPEEDY RECOVERY

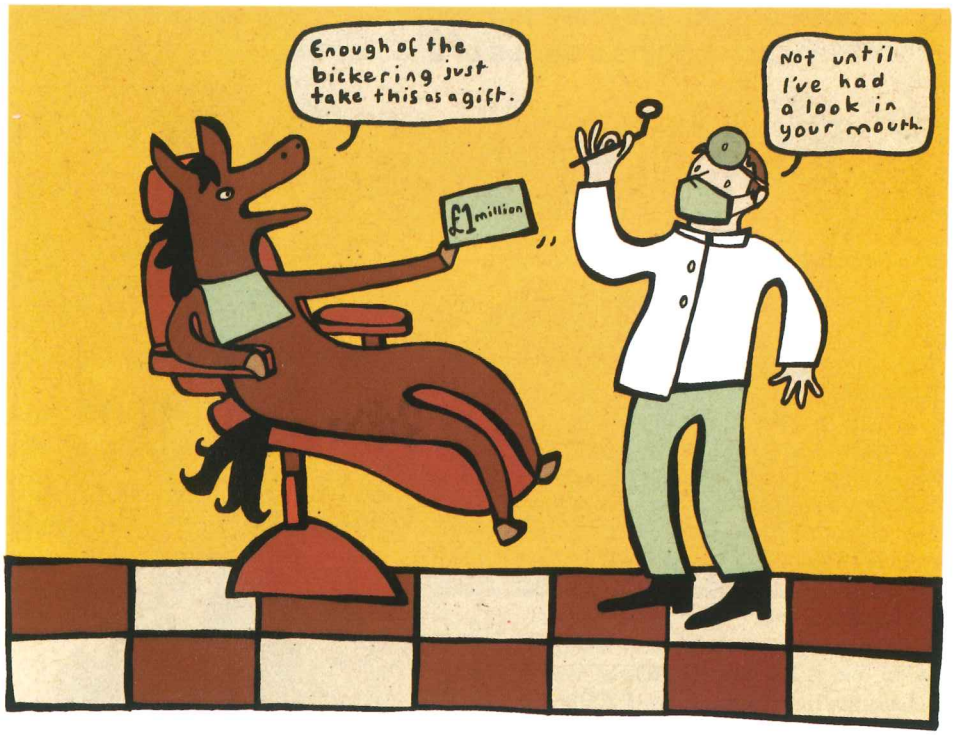
Many consultants still have problems getting paid for their services. Some clients can't pay; others won't pay. And others raise issues of professional negligence. We all want to avoid taking any formal action against clients as the chances of repeat business generally disappear if we do, but sometimes such action cannot be avoided.

Most consultants involved in construction works are aware that the Construction Act applies to the contract between the client and the main contractor, or the main contractor and its subcontractors. However, many are unaware that it can also apply to their own professional services contracts. Under section 104 (2), the Construction Act applies to "architectural, design or surveying work" in relation to "construction operations".

Although some professional services fit neatly within the act's definition, some are not so obvious. For example, would the preparation of a schedule of dilapidations under a lease fall within the definition if the repair works were subsequently undertaken? The courts have provided limited guidance on what professional services are caught by the definition, although in the Scottish case of Gillies Ramsay Diamond vs PJW Enterprises, contract administration was found to be caught. In Fencegate vs James R Knowles the giving of factual evidence in an arbitration by an architect, designer or surveyor was found to be outside the definition. Consultants should seek advice if they are in any doubt as to whether the Construction Act applies to their services.

However, even if the consultant's services are caught by the definition, the consultant may still fail to pass the "no contract in writing" hurdle, because until the proposed amendments to the act are enacted all the agreed terms of the

THE LEARNED JUDGE COULD NOT FATHOM WHY THESE PARTIES WERE SO HELLBENT ON RISKING ALL THE LEGAL COSTS ON ONE SHORT POINT



for a great big smacking – not only all your legal costs but the winner's legal costs, too. And lo, on this excursion about whether Mr Daws had actually paid or not, both sides engaged not only first-rate solicitors but two barristers as well. And in all this time, the learned judge couldn't fathom why these parties were so hellbent on risking all the costs on one short point – is the £1m cheque a payment of the sum due to Martin Daws?

Why did Treasure & Sons fret? Well, it didn't know where Hayley Daws fitted into the dispute between them and Martin Daws. Does a payment from a third party discharge a debt for another? If Hayley Daws became bankrupt, could her trustee in bankruptcy claim the money back from Treasure? Since the final account for the building work has now gone up the line from adjudicator to arbitrator, there may be some confusion about the money paid. In other words, Treasure had the colleywobbles about the money it received. Meanwhile, mind you, it did not repay the money to Hayley Daws.

By the way, the law on all this is that a payment made by a person without compulsion, intending to discharge another's debt, will not discharge that debt unless they acted with the debtor's authority and the debtor subsequently ratified payment. Also, a voluntary payment by stranger A, which purports to pay the debts of B to B's creditor C will only do that if the payment is made as B's agent, for and on account of B and with B's authority or ratification. It would have been easy for Daws and his daughter to give Treasure this information. And on the facts, the judge was satisfied that the money paid to Treasure by Hayley Daws was as agent for Martin Daws. The family ties were an important clue.

As for who bears the legal costs of this latest round, the judge will hear the parties in due course. As an aside, he did hint that if Mr Daws had made an earlier and clearer statement to Treasure of his position, all these proceedings about who paid may have been unnecessary. Yes, of course, but all this fence building is what happens in litigation. No showjumping horse gets a clear round here.

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consultant's contract need to be in writing.

Assuming they are, what sort of disputes are suitable for reference to adjudication? I can hear all the lawyers among you chanting those familiar lines "not professional negligence, not professional negligence...". This article is not the place to discuss the merits of those arguments (the inability to claim a contribution from another party, limitation periods, and so on), but in any event, if an allegation of professional negligence is raised, then the consultant's professional indemnity insurer is likely to be calling the shots.

However, if the client has not raised allegations of professional negligence and has simply not paid, the

THE COURTS HAVE PROVIDED LIMITED GUIDANCE ON WHAT PROFESSIONAL SERVICES ARE CAUGHT BY THE ACT

consultant could pull the subcontractors' favourite trick out of the hat and hit the client with its failure to issue a withholding notice. The payment provisions of the Construction Act also apply to consultants' contracts which fall under the act, so the client must therefore issue an effective withholding notice if it wants to withhold payment.

The consultant should also be able to prevent the adjudicator considering abatement if the notice of adjudication is worded narrowly enough, and even if the client is able to raise abatement, it should still not be permitted to make set-offs. For example, consider a consultant acting as contract administrator: in the absence of an effective withholding notice, the client should not be able to set-off for losses it alleges it has incurred as a result of a claim from the contractor for the late issue of instructions. The client could bring a second adjudication in regard to the set-off, but it would still have to comply with the decision made in the prior one.

Even if the client has not raised professional negligence issues, I would still recommend that a consultant seek advice from its PI insurers before commencing adjudication. This may even be a condition precedent to the insurance cover continuing.

To summarise, then, I do think that adjudication could provide a way of recovering consultants' fees, particularly in disputes where the client is not alleging professional negligence and no withholding notice has been issued. Such scenarios may only arise in limited circumstances, but consultants should understand the full range of tools at their disposal for the recovery of their fees – if they do not, they might just become another victim of the credit crunch.

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