GETTING THE FEES IN

by CHSpurin

With the exception of contingency fees, where the lawyer knowingly undertakes the risk of non-payment in the event of a failure to bring about a result, party representatives are able to take effective measures to ensure that they are remunerated for their labours. The salary of judges is safeguarded by the state and is quite independent of any duty of the parties to pay the costs of the trial. It is normal for the mediator to require payment at the start of proceedings. The odd man out in all of this is the adjudicator / arbitrator. The question of payment of an arbitrator's fees was considered in **Brian Andrews v John Bradshaw** [1999] EWCA and the provisions regarding the payment of an adjudicator's fees were considered in **St Andrews Bay Development Ltd v HBG Management Ltd** P370/03.

Bradshaw, an arbitrator, specified in his terms of appointment that both parties should make an initial £250 down payment on account. The appointment terms contradicted the terms of the construction contract, which stated that the arbitrator would receive three monthly stage payments. One party paid the £250.00, but the other, who was an unwilling party to the arbitration refused to pay. This refusal to pay annoyed Bradshaw, who availed himself of every opportunity to raise the matter of non-payment. This led to a successful application for the arbitrator's appointment to be set aside, partly on the basis of the ill will arising out of this non-payment issue and partly because the arbitrator sought expert legal advice on preliminary issues put forward by the other party whilst refusing to put the complainant's preliminary issues to the legal expert.

By the time the appeal was heard the arbitrator's award, which favoured the complainant, was available for consideration by the appeal court. The award demonstrated that the arbitrator had not in fact been biased against the complainant. For this reason the court quashed the set aside order, thereby reinstating the arbitrator. The court had some sympathy with the arbitrator because the complainant had adopted a very obstructive attitude towards the arbitrator, but otherwise noted that the arbitrator had no right to the initial down-payment and had got himself somewhat confused at times regarding some of the issues under consideration, albeit that he recovered sufficiently to make an unbiased decision. However the court was far from happy about an order of costs made against the complainant despite the fact that he had been on most counts the successful party, and because it was the other party's interim applications that had had the greatest impact on costs thus far. Since this was a judicial review action and not an appeal on merits this aspect of the award remained untouched by the court of appeal, though it was of dubious merit.

The moral of the story is 1) if an arbitrator is to require cash in advance, make sure it is allowed by the terms of the disputed contract from which the arbitrator's jurisdiction derives and 2) if such a requirement is permitted and stipulated, either decline to act if no funds are forthcoming, or alternatively, get on with the job without complaining. Furthermore, it is unwise to take a down payment from one party but not from the other since this creates an appearance of imbalance in the relationships of the parties to the arbitrator. Finally, an arbitrator needs to clearly demonstrate in reasonable terms why he might chose to differ from the standard practice of awarding that costs should follow the event, particularly if the relationship between the party deprived of costs has been somewhat strained since that could give an appearance of bias.

In **St Andrews Bay v HBG** an adjudicator sought, contrary to the terms of the underpinning JCT contract, to withhold issuing the decision pending receipt of fees and expenses, ultimately issuing the decision two days after the due date. Whilst the decision was made within the required time frame, the court held that the statutory regime impliedly required that the decision be issued promptly. However, in the circumstances the court held that these technical irregularities were not so fundamental as to render the decision a nullity. It would appear therefore that whilst an adjudicator might make a decision a day or so in advance and withhold the decision pending payment up to the due date, it is unwise to further delay issue in the event of non-payment. Recovering fees after the event is often fraught with difficulties, particularly if the paying party is impecunious. Adjudicators appear to have less financial security that other ADR practitioners.