

Case Note

Andrews v Bradshaw

English Court of Appeal

Application to remove arbitrator, bias, doubts as to arbitrator's impartiality in circumstances where one party refuses to provide costs.

by **ROBERT HUNT**

Remarks made *obiter dicta* in a recent decision of the English Court of Appeal, in *Andrews v Bradshaw* [2000] BLR 6, demonstrate the need for caution by arbitrators when only one party agrees to fees to be charged by the arbitrator or provides security for those fees.

The arbitrator was appointed by the President of the Royal Institute of Chartered Surveyors under a standard arbitration clause, which provided that the arbitration be conducted in accordance with the JCT Arbitration Rules. Rule 9.1 of the JCT Rules provided that the parties were jointly and severally liable to the Arbitrator for payment of his fees and expenses. Rule 9.2 provided that, in an arbitration which continues for more than 3 months, the arbitrator was entitled to render fee notes at no less than 3-monthly intervals and that those fees were payable 14 days after delivery of the fee note.

At the outset, the arbitrator asked both parties to accept a draft form of agreement which provided for different terms to those of the JCT Arbitration Rules under which he had been appointed, including for a minimum fee which was immediately payable; hourly, daily and booking rates; and cancellation fees. The claimant contractor signed the agreement and paid the minimum fee specified. The respondent sub-contractor declined to do so, indicating that it had been involved in the arbitration against its will and saw no reason to accept any such commitment in an appointment which had been made by a third party.

The arbitrator was called upon to determine a preliminary issue. He declined to accept the formulation of that preliminary issue by the sub-contractor, indicating in a letter dated 7 September 1998 to both parties that 'this is particularly so in view of the refusal of (the sub-contractor) so far to provide any costs on the matter'. The arbitrator refused to retract the letter.

The sub-contractor commenced proceedings for removal of the arbitrator. Thereafter, the arbitrator delivered his ruling on the preliminary issue (which favoured the sub-contractor), and ordered that each party pay its own costs as well as half of the costs of the award. At first instance, the trial judge disallowed the arbitrator's fees as to 50% of such contribution for which the sub-contractor would otherwise have been liable. The arbitrator appealed.

The Court of Appeal allowed the appeal, saying that the letter of 7 September 1998 and what followed disclosed no more than 'feelings of irritation' on the part of the arbitrator. The Court of Appeal held that, although the arbitrator's actions could not be approved, the letter and the refusal to retract it did not indicate a real danger of bias against the sub-contractor.

It is readily obvious that, in similar circumstances, another court may not be quite so forgiving.

The dangers of a court finding a reasonable perception of bias, when only one party agrees to fees to be charged by the arbitrator or provides security for those fees, may be seen from remarks made by Mance LJ, at page 18, where he said:

'On the face of it, although this was not a point pursued directly as a matter of complaint before us, it was unwise and inappropriate for the arbitrator, after accepting appointment by the President of the Royal Institute of Chartered Surveyors, to enter into a one-sided agreement of this nature and to receive any payment under it from only one party..... He was, of course, quite entitled to ask both parties whether they would agree to such an agreement, but he should not, I think, have entered into such an agreement with only one party once the other party refused to do so.'