Adjudication – Recoverability of Adjudicator's Fees – Breach of Natural Justice

PC Harrington Contractors Limited v Systech International Limited [2012] EWCA 1371 (Civ)

The Court of Appeal has held that an adjudicator is not entitled to be paid his fees where he publishes a decision that is unenforceable due to a breach of natural justice, because the parties had bargained for an enforceable decision. **James Bowling** represented PC Harrington, who successfully appealed against the decision of Mr Justice Akenhead at first instance (covered in Issue No. 18).

The Facts

PC Harrington ("**PCH**") was engaged to carry out works at Wembley Stadium. PCH engaged a sub-contractor, Tyroddy. After completion of the work, a dispute arose as to whether PCH was required to repay retention money. The dispute went to adjudication, where PCH (the responding party) argued in its Response that the payment of the retention was conditional upon final valuation, which had not taken place, and that in any event Tyroddy had been overpaid.

However, the Adjudicator (Mr Doherty of Systech) published three decisions in quick succession, refusing to consider PCH's defence as he considered the valuation of the final account to be outside his jurisdiction. That approach came as a surprise to the parties because the Adjudicator had not suggested previously that his jurisdiction was limited in this way. Neither party had argued that the Adjudicator did not have jurisdiction to consider the overpayment defence; indeed, Tyroddy had positively encouraged him to reject it on the merits.

The Enforcement Proceedings

In the first set of proceedings before the TCC (***PC Harrington Contractors Limited v Tyroddy*** [2011] EWHC 813 (TCC)), PCH argued that the Adjudicator's decision ought not to be enforced as it did not address its defence. This failure, PCH argued, constituted a breach of natural justice which rendered the decision unenforceable. Mr Justice Akenhead agreed with PCH that the Adjudicator's narrow view of his own jurisdiction had denied him the opportunity to consider the merits of the question that he was called upon to answer. Accordingly, the Adjudicator had committed a breach of natural justice and the decision was held to be unenforceable.

The Fees Proceedings

In the second set of proceedings (***Systech International v PC Harrington*** **[**2011] EWHC 2722 (TCC) – see Issue No. 18), the Adjudicator's employer (Systech) claimed against PCH for recovery of the Adjudicator's fees. PCH argued that, as the Adjudicator had rendered an award that was in breach of natural justice and therefore unenforceable, PCH could legally refuse to pay the fees. In particular,

PCH argued that the unenforceability of the decision meant that there was a total failure of consideration in the contract for services between PCH and Systech.

Mr Justice Akenhead held that the bargained-for performance was the provision of the role of adjudicator, which covers not only the production of the decision, but also (as in this case) the discharge of the remaining aspects of the role leading up to the decision, such as review of the Referral and Response, dealing with jurisdictional objections, reading the substantial documentation and communicating with the parties. This was "*at the very least partial performance*" by the Adjudicator. Akenhead J stressed the public policy considerations – that is, adjudicators under construction contracts are effectively performing a statutory role akin to the role of a judge or arbitrator.

The Appeal

The Court of Appeal (the Master of the Rolls, Lord Dyson, giving the leading judgment) overturned Mr Justice Akenhead's decision, finding that Parliament had produced a "*carefully calibrated set of provisions*" in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (which governed the Adjudications) as to when an adjudicator would be entitled to fees in circumstances where he had failed to produce a decision. Nothing in the Scheme required the parties to pay fees in circumstances where an adjudicator had reached an unenforceable decision.

The Court of Appeal held that the parties had bargained for an enforceable decision. There was nothing in the Adjudicator's terms and conditions to indicate the parties had agreed to pay for an unenforceable decision, or that they would pay for services that were preparatory to the making of an unenforceable decision. That would be a commercially unusual outcome. It would require express words, because an adjudicator who fails to decide a dispute is not fulfilling Parliament's intentions; he is causing the parties to engage in futile expense. In this regard Lord Dyson said: *"I agree that the adjudicator was obliged to perform some ancillary and anterior functions and entitled to perform others. He could not simply produce a decision out of the hat... But the question is not whether the adjudicator was obliged or entitled to take these steps prior to making his decision. Rather it is whether he was entitled to be paid for these steps if they culminated in a decision which was unenforceable".*

Lord Dyson concluded that what had been bargained for was "*an enforceable decision...which, for the time being, would resolve the dispute. A decision which was unenforceable was of no value to the parties".* He also held that an adjudicator is not acting in a capacity comparable to a judge or arbitrator. He derives his jurisdiction from a contract with the parties, unlike a judge (who has an inherent jurisdiction); and - unlike an arbitrator - if his appointment is terminated then the adjudication also comes to an end and a different adjudication would have to be commenced (whereas an arbitrator's decisions are binding on the parties).

The Court of Appeal noted that, under paragraph 11(2) of the Scheme, if the Adjudicator committed a default or misconduct in the course of the Adjudication, the parties could have revoked his appointment and would not then have been obliged to pay the Adjudicator's fees. It was illogical that there should be a different outcome just because the Adjudicator's default or misconduct only came to the parties' attention after the publication of the decision itself.

The policy considerations considered by Mr Justice Akenhead were dismissed on these grounds:

"*I can see no basis for holding that Parliament must have intended that an adjudicator who produces an unenforceable decision should be entitled to payment... Parliament did address the question of remuneration in the Scheme and produced a carefully calibrated set of provisions. I suppose that*

Parliament could have provided that an adjudicator was entitled to reasonable remuneration even where he produced an unenforceable decision, although this possibility seems rather fanciful to me. But it did not do so. I do not consider that it is legitimate, in effect, to rewrite the Scheme on the basis of some unarticulated Parliamentary policy grounds."

Lord Justice Davies agreed with Lord Dyson's judgment but observed that the judgment should not have "*any very great ramifications*" because adjudicators could incorporate into their terms and conditions a provision requiring the payment of fees and expenses if a decision was not delivered or was unenforceable. As to whether parties would be prepared to accept such terms, Davis LJ suggested that a *"solution would be in the market place"*.

The Consequences

In the normal course of events, parties will therefore only have to pay the Adjudicator if he reaches an enforceable decision on the merits (although the Court of Appeal were careful to distinguish the "*special case*" of ***Linnett v Halliwells*** [2009] EWHC 319 (TCC), where a party had made an express jurisdictional objection at the outset, but nevertheless asked the adjudicator to decide the dispute on the merits).

The impact of the decision of the Court of Appeal will of course be worked out in cases yet to come. A few of the likely issues it raises are:

- The judgment will drive up adjudicators' standards. Adjudicators will be more careful to address all of the issues. If an adjudicator thinks that there is a jurisdictional point, he should seek the parties' views in the course of the referral, and ask the parties how they want him to deal with that jurisdictional point. That is likely to lead to better and clearer decisions, more transparent decision-making, fewer errors of jurisdiction and fewer breaches of natural justice. This may, however, result in a greater number of jurisdictional debates between the parties and the adjudicator during the course of the adjudication.

- It is likely that any breach of natural justice or error of jurisdiction sufficient to deprive the decision of enforceability would bring a future case within the rule set out by the Court of Appeal and will deprive the adjudicator of his fee.

- How will adjudicators and parties respond to Davis LJ's suggestion? It remains to be seen whether the parties to adjudications will be prepared to accept a term requiring them to pay even for an unenforceable decision. Referring and responding parties may disagree about many things, but they may be united in opposition to a term which obliges them to pay a fee which may be for a worthless "non-decision."

- Even if one party agrees to accept such a term, what if the other side refuses to do the same? In those circumstances, there may be no contract between the adjudicator and the 'refusing' party. The adjudicator's entitlement to fees from that party is probably then restitutionary; in that event, it seems likely that this decision will continue to apply. In effect, the parties may each have a power to veto such a term (although of course the adjudicator could resign if that occurs).

- Would such a term fall foul of section 3 of the Unfair Contract Terms Act 1977? This provides that a clause is an exclusion clause if it permits the adjudicator to render "*substantially different*" contractual performance than was expected, or which permits him to render "*no performance*".

- The standard that adjudicators need to reach in order to produce an enforceable decision is not high. It is only the most serious defaults or misconduct that deprive their decisions of binding

effect (and thus now deprive the adjudicators of their fees). It is possible that some Adjudicator Nominating Bodies will actively discourage their members from attempting to include such a term. Either way, expect them to issue some guidance following the decision of the Court of Appeal.

- The decision is therefore likely to have significant influence on how adjudicators take on appointments, and how they run adjudications. Although the decision of the Court of Appeal is likely to lead to better decision-making, it may also cause parties and adjudicators to think harder about how they conclude the adjudicator's appointment at the outset. Until now, this has usually been treated as a formality. That is unlikely to be the case now.

- There are probably a significant number of historic cases where parties have paid adjudicators' fees even though their decisions were later found to be unenforceable. What is the status of those fees now? Can they be reclaimed in restitution (consideration for the payments having wholly failed) or on the basis that the payments were made under a mistake of law? It is likely that such claims will find their way into court before very long.

Adjudication – Jurisdiction – Whether dispute crystallised – severance

Beck Interiors Limited v UK Flooring Contractors Limited **[**2012] EWHC 1808 (TCC); [2012] 1 BLR 4170

This is an important decision in which the TCC severed an adjudicator's decision, enforcing only part of it, on grounds that part of the decision was made without jurisdiction. The Defendant was represented by **Adam Temple**.

The claimant had sub-contracted to the defendant the installation of floor coverings at the Selfridges department store in London. After the defendant's purported withdrawal from the sub-contract, the claimant demanded payments of additional costs said to have been caused by wrongful withdrawal, which the defendant largely denied. Then, after close of business on the Thursday before the Easter bank holiday weekend, the claimant wrote a letter seeking payment of liquidated and ascertained damages (LADs). These were said to be continuing at that date. On the Tuesday after the bank holiday weekend, and before the defendant had responded to the LADs claim, the claimant issued a notice of intention to refer the dispute. The referral included both the incurred costs and the LADs. However, the LADs claimed were a small fraction of the sum that had been put forward in the claimant's letter.

The defendant argued in its Response that the adjudicator did not have jurisdiction in the dispute, on the basis that no dispute had crystallised. In particular, the defendant had not had time to respond to the claim for LADs. The adjudicator decided that he did have jurisdiction, and thereafter made a decision in favour of the claimant. The LADs accounted for approximately 60% of the sum awarded.

Mr Justice Akenhead concluded that a dispute as to the costs incurred had crystallised, but the claim for LADs had not. He gave two reasons for this:

(1) The letter claiming LADs represented a *"massive ratcheting up of what had been intimated before"* and the defendant had not had time to consider it. In the circumstances, the fact that the defendant did not dispute the LADs claim did not lead to an inference that the claim was disputed; and

(2) In any event, the sum claimed in the adjudication bore little resemblance to that put forward in the claimant's letter, such that it was a materially different claim.

Having concluded that only one element of the dispute had crystallised, Mr Justice Akenhead decided that this was an appropriate case in which to 'sever' the adjudicator's decision. The sums related to the crystallised dispute were ordered to be paid, but not the sums representing the LADs claim. The rest of the adjudicator's award (most notably that the defendant pay the adjudicator's fees) was not enforced, on the basis that Akenhead J would not second guess what the adjudicator would have done.

Accordingly, Mr Justice Akenhead followed through on his *obiter dicta* in earlier cases and showed that he is willing to sever adjudicators' decisions where only part of the decision was made within jurisdiction. This is therefore an important case in the development of the court's approach to the enforcement of adjudication decisions where part of the decision is tainted by lack of jurisdiction.

Professional negligence - Planning consultants - advising public bodies

***Middle Level Commissioners v Atkins Limited* [2012] EWHC 2884 (TCC)**

Mr Justice Akenhead has rejected a claim that a planning consultant was negligent in not advising its public body client to obtain a Certificate of Lawful Development/Use in relation to the planning aspects of an upgrade to a water pumping station to protect it from potential judicial review challenges.

The successful Defendant (represented by **Elspeth Owens**) was engaged by the Claimant, a drainage authority with statutory responsibility for water level management in the Middle Level area, to provide professional services, including planning advice, in connection with the upgrading of the St Germans water pumping station.

The Town and Country Planning (General Permitted Development) Order 1995 provides that, provided certain requirements are met, certain works by drainage bodies are "permitted development" and do not require an application for planning permission. The Defendant advised that it considered the works to be "permitted development" within the meaning of the 1995 Order, a view that was endorsed by the local planning authority in writing.

Judicial review proceedings were subsequently issued by a local resident against the Claimant challenging (amongst other things) the Claimant's decision to proceed with the works without applying for planning permission. The Claimant settled those proceedings, and subsequently brought a professional negligence claim against the Defendant alleging that the Defendant should have recommended that the Claimant obtain a certificate from the local authority confirming that the works were "permitted development" (i.e. a Certificate of Lawful Development/Use), to protect it from potential judicial review challenges.

Mr Justice Akenhead held that the Defendant had not acted negligently. He found that there was at least a very strong case for saying that the works fell within the 1995 Order, and that in those circumstances it was a matter of judgment whether to apply for a Certificate of Lawful Development/Use. The Defendant's recommendation not to obtain one was not negligent, particularly where there had already been extensive consultation in the local area, and the prospect of a challenge by way of judicial review at the time the advice was given was remote.

The decision will be of significance to planning professionals who advise public bodies on planning issues, particularly where works are considered to fall within the scope of the 1995 Order or similar legislation which exempts the works from requiring a planning application. Whether or not a Certificate of Lawful Development/Use should be recommended is likely to depend on factors such as the likelihood of the works falling within the relevant legislation, the views expressed by the planning authority on that issue, and the likelihood of a judicial review challenge being brought.

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