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

PC Harrington Contractors Limited v Tyroddy Construction Limited [2011] EWHC 2722 (TCC) & ***Systech International Limited v PC Harrington Contractors Limited*** [2011] EWHC 813 (TCC)

In the recent sequel to the PC Harrington litigation, Mr Justice Akenhead has found that an adjudicator will be entitled to payment of his fees even if he has rendered a decision in breach of natural justice, provided that he sought to comply with his statutory duties under the HGCRA in good faith. **James Bowling** represented PC Harrington, the contractor that successfully challenged enforcement of the adjudicator's decision.

PC Harrington ("the Contractor") was engaged to carry out works at Wembley Stadium. The contractor engaged a sub-contractor, Tyroddy. After completion of the work, a dispute arose as to whether the Contractor was required to repay retention money. The dispute went to adjudication, where the Contractor (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 refused to consider the Contractor's defence as he considered the valuation of the final account to be outside his jurisdiction.

In the first set of proceedings before the TCC ("the enforcement proceedings"), the Contractor argued that the Adjudicator's decision ought not to be enforced as it did not address the Contractor's defence. This failure, the Contractor argued, constituted a breach of natural justice which rendered the decision unenforceable. Mr Justice Akenhead agreed with the Contractor 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.

In the second set of proceedings ("the fee proceedings"), the Adjudicator's employer claimed against the Contractor for recovery of the Adjudicator's fees. The Contractor argued that, as the Adjudicator had rendered an award that was in reach of natural justice and therefore unenforceable, the Contractor could legally refuse to pay the fees. In particular, the Contractor argued that the unenforceability of the decision meant that there was a total failure of consideration in the contract for services between the Adjudicator's employer and the Contractor.

Prior to the fee proceedings, there were no authorities directly relating to an adjudicator's entitlement to fees where a decision proved unenforceable because of a breach of the rules of natural justice. The court made an order requiring the adjudicator's fees to be paid.

Mr Justice Akenhead held that an adjudicator's duty was to comply with the duties set out at section 108 of the Housing Grants, Construction and Regeneration Act 1996 and having regard to his Terms of Engagement. Where an adjudicator had sought to comply with his statutory duties in good faith, there would be no total failure of consideration. In this case the Adjudicator (in the Judge's words) "*honestly and unwittingly misunderstood what his jurisdiction was*", and, in declining to deal with the Contractor's defence, put himself in a position in which he was in significant breach of the rules of natural justice.

The Judge considered 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.

Further, the Judge rejected the Contractor's alternative argument that there was an implied term in the adjudicator's terms of appointment providing that the adjudicator would comply with the rules of natural justice. He held *obiter* that the idea that adjudicators could be sued for breach of such an implied term is contrary to Section 107(4) of the HGCRA.

This is a notable case because it confirms that adjudicators can expect to be paid by the parties even if their decision was unenforceable due to breach of the rules of natural justice. This judgment adds to the jurisprudence (notably, *Linnett v Halliwells LLP* [2009] BLR 312) on the role of an adjudicator. Akenhead J stressed the public policy considerations – that is, adjudicators under construction contracts are effectively performing a statutory role; Parliament has procured by legislation that there is to be an available adjudication procedure and, subject to specific terms being agreed otherwise, an adjudicator who undertakes the role of adjudicator is not merely being employed to produce a decision but, in broad terms, to put into effect Parliament's intentions.

Some might consider the effect of this case surprising: since the common law provides that it is impossible to abate a professional's fees, and the statutory Scheme provides that the adjudicator is immune from any cross claims based on the additional cost of submitting the dispute to adjudication again (because there is no enforceable decision), the result is that the parties will be required to pay, in full, for a worthless decision resulting from the fact that the adjudicator made an error entirely of his own making, and they have no grounds to recover the resulting loss, or reduce the adjudicator's fees.

Limitation periods – section 14A Limitation Act 1980 – Knowledge of damage and right to bring a claim

Renwick v William Attwell and Associates [2011] EWHC 2695 (TCC) & ***Clinton Eagle v Redlime Limited*** [2011] EWHC 838 (QB)

Two recent summary judgments have provided helpful guidance on the application of section 14A of the Limitation Act 1980 to cases of negligence by construction professionals. In *Clinton Eagle v Redlime* (where **Oliver Ticciati** represented the successful defendant) and *Renwick v Attwell* (where **Alexander Hickey** represented the successful defendant), the High Court reviewed the authorities relating to section 14A and decided on the extent of the knowledge required for time to run under that provision. These cases do not change the current state of the law as set out in *Haward v Fawcetts* [2006] 1 WLR 682, but do illustrate the circumstances in which the court will be prepared to find that the claimant had the requisite degree of knowledge.

Section 14A of the Limitation Act 1980 of course provides an alternative limitation period to the regular limitation period for a tort claim (i.e. six years from the date on which damage is sustained) in cases of latent defects; in simple terms, under section 14A limitation expires three years from the date on which the prospective claimant had the required knowledge to bring an action in respect of the damage suffered.

Renwick v Attwell related to an extension on a home. In late 2000, the Claimants engaged a structural engineer to advise on the planned extension. By early 2002, with the works not yet complete, the extension began to leak. Remedial works were carried out, but isolated spots of damp emerged between 2002 and 2008. In 2007, the Claimants procured an expert to examine the extension. The expert found that the water ingress had resulted from internal render coming away from the concrete. The Claimants issued proceedings in late July 2010 against the structural engineer, alleging that it did not give adequate advice either at the design stage or in relation to the remedial works.

The Claimants relied upon section 14A of the 1980 Act, claiming that it only became aware of the damage in 2007 or 2008. The Defendants claimed that the Claimants had sufficient knowledge of the damage and its potential claims by 2002, when the water ingress started.

Mr Justice Akenhead considered the various authorities set out in *Haward v Fawcetts*, and - relying on the *dictum* of Lord Nicholls in *Haward v Fawcetts* to the effect that "*the claimant must know enough for it to be reasonable to begin to investigate further*"- drew out two key conclusions: first that in the context of section 14A(5), knowledge does not mean certainty, but knowledge of sufficient facts or matters to institute either a claim or the taking of advice or the collation of evidence will often suffice to institute the "*earliest date*";

second, that in the context of section 14A(8) and the requirement that a claimant must know that the damage in question is attributable at least in part to the basic acts or omissions said ultimately to constitute negligence, "*attributable*" means 'capable of being caused by' as opposed to 'demonstrably caused by' the negligence.

Mr. Justice Akenhead therefore held that time begins to run under section 14A when a claimant has sufficient knowledge to justify issuing a claim form, taking advice and collecting evidence. He considered that this stage had been reached in around 2002, when the extension began to leak. By that stage the Claimants believed that the contractor's poor workmanship was to blame; but it had at least crossed the Claimants' mind that inadequate design, and specifically the structural engineer's inadequate design, might be to blame: the judge paid particular attention to an e-mail sent by one of the Claimants to the architect in February 2002 threatening legal proceedings against the structural engineer.

Clinton Eagle v Redlime related to the construction of a kennel block on the Claimant's land. The Contractor was engaged in early 2000 to construct the kennels in accordance with designs that the Claimant had already procured from a surveyor. Early on in the works, the Claimant became concerned that the Contractor had not dug any foundations for the kennel block. However, when challenged, the Contractor stated that digging foundations was the "*old-fashioned*" way of building structures, and the "*modern method*" was a floating slab. It was common ground that this reassurance prevented any relevant knowledge from being acquired at this stage. However, by September 2006, the block began to display subsidence problems, and the Claimant instructed solicitors. On 9 October 2006 the Claimant wrote to the Defendant indicating that he intended to pursue the Defendant for the cost of remedial work. The Defendant denied liability by letter dated 12 October 2006 and the Claimant commissioned an expert report. The expert reported in November 2006. Proceedings were not issued until 29 October 2009.

Mr Justice Eder in *Clinton Eagle*, like Mr Justice Akenhead in *Renwick*, also relied on the *dictum* of Lord Nicholls in *Haward v Fawcetts*. Applying that test, the Judge held that the Claimant knew enough for it to be reasonable to begin to investigate further before 29 October 2006 given that he had by then (a) instructed solicitors (b) written the letter of 9 October 2006 and (c) instructed an expert. It was not necessary for the expert's report to have been received as the Claimant contended. Therefore the claim was statute barred – although the Claimant had missed the expiry of limitation by only one month.

These cases do not contain any surprises, but emphasise that it is important for the claimant and his solicitors to start investigations as soon as possible once the first signs of damage emerge. The key test, citing Eder J, is whether a claimant has "*sufficient confidence to justify embarking on the preliminaries to the issue of a writ*", or knows "*enough for it to be reasonable to investigate further."* This is important in construction litigation, where the extent of damage, and the apportionment of responsibility between contractor and various consultants, may initially be unclear.

Representative claims – CPR 19.6(1)

***Millharbour Management Limited v Weston Homes Limited* [2011] EWHC 661 (TCC)**

Mr Justice Akenhead's judgment concerned the operation of CPR Rule 19.6, which allows representative actions (akin to US-style class actions) in English litigation. **Anthony Speaight QC** acted for the Claimants, and **David Friedman QC** and **James Leabeater** acted for the Defendant.

CPR Rule 19.6(1) provides that, where a group of people have the same interest in a claim, one member of that group may start a claim on behalf of other members of that group. This provision of the CPR is rarely invoked, as a result of a string of cases which made it very difficult to prove that a representative claimant had the 'same interest' as a non-party to an action.

The case relates to a property defect dispute between leaseholders and developers of a block of 350 flats in the Docklands area of London. The claimant leaseholders alleged that, as a result of a defective hot water system, there was excessive heat in the corridors and flats in the building.

Of the 350 flats in the building, the owners of some 150 flats were claimants in the action, but the owners of the other 200 flats were not. Two of the claimants sought a declaration under r.19.6 permitting them to act in a representative capacity for all leaseholders; one claimant representing the leaseholders who had bought their flats from the developers, and the other claimant representing all other leaseholders. The developer

argued that the application made under CPR r.19.6 ought to be dismissed as the representatives did not have the 'same interest' as those that they wished to represent.

Mr Justice Akenhead looked at various English authorities where representative actions had been allowed. From these authorities, the Judge concluded that in order for a representative action to be allowed, it was necessary to identify whether a particular individual is inside or outside the represented class. On the facts, the Judge held that the non-parties to the action did have the same interest as the representative claimants, as they would have the same cause of action in relation to the same defects.

Having established that the representative claimants had the same interest as the non-parties to the claim, the Judge considered whether there was any reason why he should use his discretion under r19.6(2) not to allow the representative action. Noting that it is not uncommon in the TCC for the owners or occupiers in large blocks to bring claims against builders, architects or engineers, the Judge considered that representative actions were preferable to the "*extraordinarily cumbersome and costly procedure for hundreds of claimants to be parties to the proceedings*". In exercising his discretion to allow the application of the two representative Claimants, the Judge satisfied himself that the decision did not increase the costs risk for the Defendants (in part because of the existence of an ATE policy). Further, the Judge held that it was no bar to a representative action that some leaseholders in the building might have statute-barred claims, nor was it relevant that some potential claimants had decided not to become claimants in the action.

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