Natural Justice and Adjudicators' Fees

Yesterday (23 October 2012), the Court of Appeal overturned a controversial TCC decision from last year, which required the parties to pay an Adjudicator his fee - despite his decision being reached in breach of the rules of natural justice and therefore unenforceable.

The Adjudications and the Part 8 Declaration

PC Harrington Contractors Limited were sub-contractors employed by Multiplex Constructions (UK) Limited on the construction of the new Wembley Stadium. PC Harrington retained Tyroddy Construction Limited as fix-only, reinforcement sub-subcontractors. There was a similar relationship between PC Harrington and Tyroddy on two other projects at Liverpool and Mansfield.

Disputes arose on all three projects, and Tyroddy commenced adjudications in accordance with express terms of the sub-subcontracts (which complied with s108 Housing Grants Construction and Regeneration Act 1996). Decisions were made in each case in Tyroddy's favour. The Adjudicator was an employee of Systech International Limited.

PC Harrington believed that the Adjudicator had failed to observe the rules of natural justice, by failing to consider defences it had advanced. It commenced Part 8 proceedings in the

TCC for declarations to that effect, as a pre-emptive strike to prevent Tyroddy enforcing the decisions.

In the TCC Mr Justice Akenhead decided that in reaching his decisions the Adjudicator "unwittingly fell below the standards which are required to enable the decision or decisions to be enforced". The Adjudicator had honestly, but wrongly, formed the view that defences available to PC Harrington were outside his jurisdiction. The Judge granted a declaration which included that the Adjudicator had "in each Adjudication committed a material breach of natural justice, in consequence of which each of the Adjudicator's Decisions in the Wembley, Mansfield and Liverpool Adjudications is unenforceable". (PC Harrington Contractors Limited v Tyroddy Limited [2011] EWHC 813 (TCC))

Thus far, the case was remarkable only in that it is one of relatively few cases in which an Adjudicator's decision has been held not to be enforceable.

The Adjudicator's Fee Claim

The real interest in the case began when the Adjudicator – or strictly speaking, his employer Systech - claimed his fees from PC Harrington. Although the parties were jointly and severally liable for his fees according to his appointment, Tyroddy had ceased trading and so the fees claim was made against PC Harrington.

The case was heard in October 2011. PC Harrington argued that it should not have to pay the fees given that the TCC had already decided that the Adjudicator had not produced enforceable decisions. It said that there had been a "total failure of consideration" as a result of which it was not under a contractual obligation to pay the fees. There was no suggestion of dishonesty, fraud or bad faith on the part of the Adjudicator.

To the surprise of many in the industry, Mr Justice Akenhead decided that the Adjudicator was entitled to recover his fees. Although he found again that there had been breaches of natural justice, he dismissed the "total failure of consideration" argument - because the Adjudicator was required to perform other services along the road to his decision. These included forming a view on jurisdictional challenges, and making procedural directions. He was engaged, according to his agreed terms of appointment to "act as Adjudicator" and not solely to produce a decision.

The Adjudicator was awarded the whole of his fees, despite all three decisions being unenforceable. (Systech International Ltd v PC Harrington Contractors Ltd [2011] EWHC 2722 (TCC))

The Aftermath

Opinion was heavily divided – even amongst practicing Adjudicators. Many users of adjudication felt that it was wrong that an Adjudicator should still be paid – in full – where the whole process has to be re-run through his failure to observe the rules of natural justice. Others pointed to Adjudicators' statutory immunity from suit and the (now routine) enforcement by the Courts of decisions which contained patent errors, and argued that this was merely an extension of the intention of Parliament that adjudication would be rough justice and that provided an adjudicator did his honest best that was sufficient.

The Court of Appeal

PC Harrington appealed and the fee claim came before the Court of Appeal almost exactly a year after the October 2011 decision in Systech's favour. The case was one of the first to come before the Court of Appeal since the former Presiding Judge of the Technology and

Construction Court, Lord Dyson, took office as the Master of the Rolls on 1 October this year.

The Court of Appeal held that the answer had to be found from the proper construction of the terms of the contract between the parties and the Adjudicator. These were partly in the Adjudicator's agreed terms of appointment, but were also in the Scheme for Construction Contracts, which applied in this case.

Lord Justice Davis found that the Adjudicator had "not produced an (enforceable) decision which determines the matters in dispute: which is what this contract required of him before his entitlement to fees arose".

The Master of the Rolls thought that a careful analysis of the Scheme supported that approach. Under the provisions of the Scheme, if the Adjudicator had made clear his intention to act in breach of natural justice in advance, the parties had the power to revoke his appointment for default or misconduct – and he would not be entitled to any fees. "It makes no sense" he said "for the parties to agree that the adjudicator is not entitled to be paid if his appointment is revoked for default or misconduct *before* he makes his purported decision, but to agree that he is entitled to full remuneration if the same default or misconduct first becomes manifest in the decision itself".

The appeal was allowed, and the Adjudicator did not recover his fees. (PC Harrington Contractors Ltd v Systech International Ltd [2012] EWCA Civ 1371)

The essential principle established was that an Adjudicator will not be entitled to his fees where the decision he produces is not capable of enforcement due to his failure to apply the rules of natural justice.

Limits on the Decision

The decision does not appear likely to apply in practice to most 'jurisdiction' cases. If the Responding Party raises a jurisdiction challenge, but the Referring Party confirms that he wishes the Adjudicator to continue then the Referring Party will remain liable for the fee, even if the decision is not enforceable. The same may be true of the Responding Party, depending upon the terms of its objection and whether it withdraws or continue to participate.

So far as natural justice is concerned, this Court of Appeal authority now binds the TCC in a Scheme case, where there are no terms agreed by the parties which expressly require payment even where the decision is not enforceable. (It is open to an Adjudicator to propose such terms, but they seem unlikely to be generally agreed.)

The reasoning of the Court of Appeal was however heavily based upon the detailed wording of the Scheme, little of which is reflected by mandatory provisions of the 1996 Act. A different result would still appear possible in a case where the parties had made a different – but s108 compliant - agreement to adjudicate.

However, for all practical purposes it seems relatively safe to say that Adjudicators who breach the rules of natural justice such that their decisions are not enforceable will no longer be entitled to any payment.

Not every breach of the rules of natural justice will result in a decision being unenforceable. The decision of the Court of Appeal in Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 made clear it will only be in the plainest cases ofobvious unfairness that the Courts will intervene.

In all other cases, the decision should be complied with – and the Adjudicator should be paid.

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24.10.2012

(25.10.12) Postscript: We note that some debate is already appearing as to whether the decision applies to 'jurisdiction' cases, or only to 'natural justice' cases. We have already been asked to comment on the prospective recoverability of fees in a typical mid adjudication jurisdiction challenge scenario - based on commentary appearing elsewhere to the broad effect that no fees are payable wherever a decision is unenforceable due to lack of jurisdiction.

We agree that in the unusual case where an Adjudicator unexpectedly answers a different question to the one set out in the Notice, and where it is not possible to sever the offending part of the decision, then he is likely to fall foul of the principles in this case. Such a decision would be unenforceable as made without jurisdiction, and also unenforceable as made in breach of the rules of natural justice (since by definition the parties would not have been heard on the point). Either would suffice.

However, it is wrong in our view to characterise the decision as disentitling an Adjudicator to his fee in the typical (and very common) 'jurisdiction challenge' scenario, which we describe above. That is made clear in our view by paragraph 44, expressly endorsing the decision of Ramsey J in Linnett v Halliwells LLP [2009] EWHC 319 (TCC).