

# ADJUDICATION, NATURALLY

David Wilson

**On 29 March 2017, Lord Tyre of the Outer House of the Court of Session handed down an opinion in *Bell Building Projects Limited v Arnold Clark Automobiles Limited* and addressed the principle of natural justice in the adjudication arena.**

## Background

Bell Building Projects Limited ("BBP") carried out works for Arnold Clark Automobiles Limited ("ACL"), specifically the construction of a new car showroom on Alexandra Parade in Glasgow. The works were terminated by ACL and in doing so an adjudicator decided that ACL was in breach of contract. To recover losses, BBP referred the matter of damages in a separate adjudication. The Adjudicator found in favour of BBP, awarding payment of £1,010,328.08. BBP raised enforcement proceedings in the Court of Session for payment of the awarded sum. It was ACL's defence that the Adjudicator had breached the rules of natural justice.

## Natural Justice and Adjudications

The general principle of natural justice is that each party must be given a fair opportunity to present its case. The adjudicative process is short and sharp due to the tight 28-day timescale (subject to any agreed extension of time) in which parties require to present their case and the adjudicator issues his or her decision. However, Lord Tyre made clear in his opinion that adjudications' distinguishing features do not negate the principles of natural justice. Further, while it is open to parties to overturn an adjudicator's decision in litigation or arbitration, more often than not an adjudicator's decision is the final word on the dispute and as such the principles of natural justice are integral to adjudications.

## Allegation of Breach of Natural Justice

ACL contended that the Adjudicator had breached the principle of natural justice by denying it a fair opportunity to present its case or to respond to BBP's case. It was ACL's position throughout the adjudication that the Adjudicator was following an unfair process. ACL's allegation of a breach of natural justice referenced two main issues:

### 1- ACL's Contra-Charge for Rectification Works

ACL had a contra-charge claim for works required to rectify the car showroom. The Adjudicator requested that ACL provide additional documentation the day before his decision was due. ACL complained that this request did not afford it requisite time and as such was a breach of natural justice. There were a multitude of issues for the Adjudicator to determine and his last minute request of ACL did not, in the opinion of Lord Tyre, open him to criticism. There was no breach of natural justice in this respect.

### 2- BBP's Loss and Expense Claim

The Adjudicator requested an opportunity to visit BBP's offices to inspect documents which evidenced the loss sustained by BBP as a result of ACL's contract termination. ACL accused the Adjudicator of building BBP's case and refused to attend the visit to BBP's offices. Making reference to the principle of natural justice, the Adjudicator declined to make the visit without ACL. As a result BBP produced



the documentation required and this was sent to the Adjudicator and to ACL's solicitors, although received late by the latter. ACL complained that it was disadvantaged and would not be able to respond meaningfully in the timescales to the additional BBP documentation.

Lord Tyre opined that the time afforded to ACL to respond was adequate. ACL's refusal to participate in the visit was unreasonable and was a major factor in the requirement for the additional BBP documentation. Further, the Adjudicator had suggested a two day extension of time and ACL failed to respond. As such Lord Tyre found that ACL could not now complain of unfairness. In other words, you can't have your cake and eat it!

## Severability

BBP's secondary position depended on severability. If a breach of natural justice was determined, the vitiated part of the decision could be severed and an award could be made to BBP based on the remaining part of the decision. Although Lord Tyre did not need to go into detail on this point, he provided a view:

precedent is set against severance and although there were a number of different issues to be determined the matter was a single dispute. Lord Tyre found that deducting an amount from the Adjudicator's award would have effectively re-written his decision and this was not permissible.

## Comment

Lord Tyre's decision is another example of the Court of Session paying deference to adjudicators' decisions and the adjudicative process. Natural justice is important in adjudications, however it is to be balanced with the need for expeditious resolution of disputes. An adjudicator is required to act fairly in all the circumstances, however parties must also be sure they have acted reasonably during the adjudicative process should they intend to rely on a breach of natural justice to challenge an adjudicator's decision.

\*This article was co-written by Shona McCusker.

## About the Author

David Wilson joined MacRoberts in 2000 and specialises in contentious construction law. He is accredited by the Law Society of Scotland in this regard.

He advises in all types of construction projects/ disputes, and has extensive experience of pursuing and defending parties in commercial disputes in the Court of Session, Arbitration and Adjudication as well as providing legal advice to Adjudicators.

He also lectures to the industry and contributes to the MacRoberts Construction Bulletins and e-updates.

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