

An adjudicator's decision on a construction contract is definitely worth the paper it's written on!

By Maria Cole



It's only in rare circumstances that the courts will interfere with the decision of an adjudicator on a construction contract. A recent decision out of the English Technology and Construction Court (**TCC**) considered arguments that an adjudicator acted in breach of the principles of natural justice by reaching a decision on a basis not advanced by either party to the adjudication and by failing to consider a defence raised by the defendant.

Background¹

The claimant obtained an adjudicator's decision in its favour against the owner of an industrial estate it had done work for (the **defendant**). The defendant refused to pay up and so the claimant brought enforcement proceedings in the TCC.²

The background to the dispute was that the claimant had submitted a formal tender to carry out refurbishment works for the defendant. The form of tender, which had been drafted by the defendant's agent (**B&L**), said that until a formal agreement was signed, the tender document would constitute the contract between the parties. The tender was accepted and so a contract came into existence between the parties (**original contract**).

¹ This background reflects the findings of the Adjudicator as recorded in the TCC decision.

² *Bilton & Johnson (Building) Co Ltd v Three Rivers Property Investments Limited* [2022] EWHC 53 (TCC).

Under the original contract, the works were to be carried out in four sections and there would be completion dates for each section. The original contract stipulated a rate of liquidated damages for delay in completing each section of £2,500.00 per week.

B&L then prepared and issued a formal design and build contract for the claimant to sign and return, which the claimant did (the **signed contract**). The signed contract specified a single date for completion of the works (not different dates for each section) and liquidated damages were stated to be £2,500.00 per week (as opposed to £2,500.00 per section per week).

When B&L noticed these (and other) discrepancies, it issued an amended contract for the claimant to sign. The claimant didn't sign, or by its actions consent to, the proposed amendments. So, under the signed contract liquidated damages for delay were £2,500.00 per week and could be apportioned among the four sections of work should some be completed before others.

In the course of completing the works, the claimant was granted extensions of time but only in respect of the individual section of the



works which had been affected by the relevant delay. This was wrong. The signed contract didn't provide for a completion date for each section. Any relevant delay which affected the timing of the works as a whole should have given rise to an extension for completion of the works.

The claimant achieved practical completion mid-December 2019. However, by then the defendant had already taken partial possession of some of the works. In a purported application of the contractual liquidated damages provisions, the defendant withheld just over £223,500.00. The damages had been calculated at £2,500.00 per section per week of delay and didn't take into account that the defendant had taken possession of certain parts of the works earlier than other parts. Also, there were a number of delays to the works not caused by the claimant.

An application for adjudication followed. The claimant's position was that the original contract had not been formed in 2018 and that the only contract agreed was the signed contract. But that even if the original contract had been formed, it lacked the terms which were essential to the dispute (regarding sections, dates for possession and completion, and liquidated damages). The defendant's position before the Adjudicator was that the original contract was formed between the parties and that no further contractual documents came into existence between them. The defendant also argued that the defence of rectification³ allowed it to proceed on the basis that the liquidated damages provisions of the signed contract entitled it to £2,500.00 per section per week, as per the original contract.

After considering the arguments, the Adjudicator decided that the parties entered into the original contract, which was superseded by the signed contract. The Adjudicator rejected the defendant's rectification argument. After calculating the effect of delay, and apportioning for early possession, the Adjudicator decided the defendant had been entitled to withhold £6,368.08. Accordingly, the defendant was required to pay the claimant just over £228,000.00, which it had previously deducted from the contractual payments due to the claimant by way of liquidated damages, plus interest and the Adjudicator's costs.

3 Parties may apply to the court for rectification of the terms of a written contract or deed where it does not correspond to the shared intention of the parties.

4 To get summary judgment, a plaintiff has to satisfy the court there is no defence to all or part of a claim. To defend an application for summary judgment, a defendant has to show a credible dispute of fact, or other foundation for a defence to establish the prospect of successfully defending the claim.

5 Above, n 1 at [4].

Enforcement proceedings are issued

The defendant didn't pay up (except for paying half of the Adjudicator's fees and expenses). So the claimant brought court proceedings to enforce the decision by way of summary judgment.⁴ At the hearing, the defendant raised two arguments:⁵

First ...the Adjudicator's findings as to the applicable contractual terms were made in breach of natural justice because they were based on arguments that were not advanced by either of the parties and which were not canvassed with the parties. Second ... that in refusing to accept the defence of rectification regarding the contractual rate for liquidated damages, the Adjudicator took a restrictive view of his jurisdiction which he did not canvass with the parties, thereby breaching natural justice and failing to exhaust his jurisdiction.

A claim of breach of natural justice

Natural justice requires that the parties to a dispute are advised of and given a fair opportunity to respond to the main points relevant to the dispute and the decision. However, an adjudicator doesn't have to consult with the parties on every element of their thinking before issuing a decision.

The TCC found that just because the Adjudicator's *precise reasoning* (that the parties had entered into the original contract first and then the signed contract) didn't appear to have been an argument advanced by either party, this didn't come close to establishing a breach of natural justice. The Judge said the defendant had had a full opportunity to make submissions as to which contractual terms applied and why, and that *this was plainly a case where the Adjudicator's reasoning was derived from, rather than expressly set out in, the parties' submissions*. It was not a case where the Adjudicator had found a new and different basis for the claimant's claim and not put that new case to the defendant for it to respond to.



Did the Adjudicator fail to “exhaust” his jurisdiction?

The wonderful term “exhausted jurisdiction” has come to us from the Scots. It refers to a particular breach of the principles of natural justice where an adjudicator has failed to consider all the available evidence and accordingly inappropriately limited their own jurisdiction. In order for a claim of this nature to succeed, the failure must be deliberate and it must be material.

The TCC stated that the defendant's complaint on this point proceeded from an *unpromising starting point*. After summarising the Adjudicator's reasoning for rejecting the rectification defence, the TCC held that whether or not the reasoning was correct as a matter of law was not material to whether the decision should be enforced. The Judge said that for the defendant to avail itself of the defence it was necessary to show a *deliberate failure on the Adjudicator's part to address it* and that *manifestly there was no such failure*. The Judge concluded that the grounds of defence were ill-founded and didn't disclose a realistic prospect of successfully defending the claim. The claimant's application for summary judgment was accordingly granted.

Conclusion

This decision reinforces that courts will only accept that an adjudicator's decision should not be enforced in the clearest of situations where an adjudicator has gone beyond their jurisdiction and/or seriously breached the rules of natural justice. Where an adjudicator has endeavoured to address the questions referred to them, and given the parties a fair opportunity to respond to the main points relevant to the dispute and the decision, the decision will be enforceable.

ABOUT THE AUTHOR



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