



LEGAL BRIEFING

Systech International Ltd v PC Harrington Contractors Ltd [2011] EWHC 2722 (TCC), Mr Justice Akenhead

This case involved an important issue relating to the recoverability of adjudicators' fees where the decision of the adjudicator was said to be unenforceable by reason of a failure to comply with the rules of natural justice. The question as to whether there had been a total failure of consideration arose in those circumstances.

The Facts

PC Harrington Contractors Ltd ("Harrington") engaged Tyroddy Construction Ltd ("Tyroddy") as fix-only, reinforcement sub-subcontractors for works on three projects. Having not completed a formal final accounting process, many years passed before Tyroddy commenced three adjudications asking the adjudicator to decide the amount of retention due and payable for each project. The adjudicator was an employee of Systech International Ltd ("Systech") and accepted his appointment on the basis of certain written terms and conditions of engagement, which the parties accepted.

The adjudicator decided that Harrington had to pay the amounts retained to Tyroddy. Harrington argued that the decisions were not enforceable on the grounds that the adjudicator had breached the rules of natural justice by failing to address the defence put forward in each adjudication that no retention could be due because Harrington had already overpaid Tyroddy on each of the projects. Mr Justice Akenhead agreed and in *PC Harrington Contractors Ltd v Tyroddy Construction Ltd* [2011] EWHC 813 held that the decision was unenforceable because although the adjudicator had acted honestly in ruling (wrongly) that issues relating to the final account were outside his jurisdiction, he had unwittingly fallen below the standard required to enable the decisions to be enforced.

Tyroddy had ceased trading before the adjudication so Systech sued Harrington for the adjudicator's outstanding fees. In defence of these proceedings Harrington argued that there had been a total failure of consideration on each appointment and that the adjudicator had failed to issue "Decisions" in accordance with the Scheme. This was on the basis that the adjudicator had failed to produce decisions that were enforceable by reason of breaches of natural justice. This defence included a suggestion that there was an implied term of the contracts of engagement that the adjudicator would conduct the adjudications in accordance with the rules of natural justice.

The Issues

Was Systech entitled to recover the adjudicator's fees from Harrington notwithstanding the fact that the decisions were unenforceable?

Had there been a total failure of consideration?

The Decision

Mr Justice Akenhead drew the following general conclusions, relevant to this case, in relation to how the doctrine of total failure of consideration can arise:

- (a) *In relation to contracts, it is the law relating to quasi-contract and restitution to which one must have regard in addressing total failure of consideration.*
- (b) *One must determine as a matter of ordinary principles of contractual interpretation what the essential contractual performance bargained for was.*
- (c) *Where the bargained for performance is on analysis the provision of one or even a number*

of services or things, there must on analysis, on the facts, be a total or complete failure to perform on the part of the provider.

- (d) *Where there has been a total or complete failure to provide any of the services or things bargained for, there will be a total failure of consideration. Where some of the services or things bargained for have been provided, there has not been a "total" failure of consideration."*

Therefore, on the facts of this case, Mr. Justice Akenhead rejected Harrington's defence and held that there had not been a total failure of consideration and the adjudicator was entitled to payment. The Judge's reasoning included the following:

- 1 The adjudicator's role covered not only the production of the decision but also the conduct of the adjudication in the period leading up to the decision. In reviewing the parties' submissions and communicating with the parties the adjudicator had partially discharged his role of adjudicator.
- 2 Unless there is a suggestion of dishonesty, fraud or bad faith, the Court should be slow to infer that an adjudicator may not be entitled to his fees if his decision is held unenforceable, provided the adjudicator had done his honest best in performing the role as an adjudicator.
- 3 It was unnecessary to imply a term that the adjudicator would act in accordance with the principles of natural justice, since the Court will not enforce an adjudicator's decision reached in breach of the principles of natural justice.
- 4 The idea that adjudicators could be sued for breach of such an implied term is contrary to Section 108(4) of the Housing Grants, Construction and Regeneration Act 1996.

Comment

Adjudicators have obviously welcomed this decision as it appears to confirm that in most circumstances even if a decision is unenforceable by reason of a failure to comply with the principles of natural justice, if the adjudicator acts honestly and in good faith he will be entitled to payment. There appears to be no source of recompense for a party who has paid for an unenforceable decision and this appears to be another of the risks of adjudication.

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