

You can't always get what you want

John Starr analyses a new judgment on the ambit of an adjudicator's jurisdiction



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'One of the grounds on which the Technology and Construction Court can refuse to enforce an adjudicator's decision is where the decision is the result of a breach of natural justice. The concept of natural justice requires that every party to a dispute has the right to a fair hearing before an impartial tribunal.'

Under Part II of the Housing Grants, Construction and Regeneration Act (HGCRA) 1996, a party to a construction contract has the right to refer a dispute arising under the contract to adjudication. An adjudicator's decision is binding and enforceable by means of an application to court to transform it into a judgment. The Technology and Construction Court offers a swift procedure for doing this.

However, any party considering referring a dispute to adjudication needs to be careful not to try to be too clever when it comes to defining the ambit of the dispute to be referred, or it may cause difficulties with enforcement.

Pilon Ltd v Breyer Group plc [2010] shows that seeking to restrict the matters on which an adjudicator can decide too narrowly may result in an unenforceable decision. This means that a referring party may be successful in obtaining an adjudicator's decision in its favour but unable to persuade the Technology and Construction Court to enforce that decision.

A breach of natural justice

One of the grounds on which the Technology and Construction Court can refuse to enforce an adjudicator's decision is where the decision is the result of a breach of natural justice. The concept of natural justice requires that every party to a dispute has the right to a fair hearing before an impartial tribunal.

AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2004] established that an adjudicator is obliged to comply with the rules of natural justice. In that case, Judge Toulmin CMG QC said:

The evidence must be looked at both in relation to the individual complaints and

the overall effect of the evidence. Within the test of bias it is important to note that there may be single acts of a failure to act fairly, eg by failing to hear both sides of a dispute, which may be sufficient to invalidate an adjudication. In such circumstances, it may be more appropriate to categorise them as breaches of natural justice, rather than bias.

In Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] Chadwick LJ made it clear that the court will refuse to enforce an adjudicator's decision if they fail to comply with the rules of natural justice. He said:

Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision... We do not understand there to be any challenge to those general principles. They are fully supported by the authorities.

One of the fundamental principles of natural justice is that the tribunal must hear both sides of the dispute. One party cannot be allowed to prevent the tribunal from hearing the other party's case, as *Pilon* attempted to do.

A restriction on the adjudicator's jurisdiction

An adjudicator's jurisdiction is defined by the notice of adjudication, which is to say that the adjudicator can only decide what they have been asked to. As a consequence, referring parties have taken to referring narrower and narrower disputes to adjudication. For example, a contractor might want the adjudicator to decide how much it is due to be paid under an interim application, but without troubling them with any

claims the employer might have about defects or damages for delay.

Until recently it has not been clear how far an adjudicator can go in restricting what they reach a decision on, and the extent to which they take notice of submissions.

The Scheme for Construction Contracts (England and Wales) Regulations 1998, which underpins the adjudication provisions of HGCRA 1996, says that the adjudicator:

... shall consider any relevant information submitted to him by any of the parties to the dispute.

But what if that information appears to relate to something outside the ambit of the notice of adjudication? Is it still relevant? Is it within the adjudicator's jurisdiction?

A recent case

In *Pilon v Breyer* Coulson J clarified the position by saying that:

... adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim, but... a responding party is entitled to defend himself... by reference to any legitimate available defence (including set-off).

In other words, narrow wording in the notice of adjudication will not help to keep out other claims by the responding party. The rules of natural justice require both sides to be heard.

The facts

Pilon, a specialist refurbishment contractor, carried out work for Breyer on a site in Ealing. Disputes arose between the parties. Pilon left the site and subsequently issued an interim application for £337,000, which remained unpaid. It commenced an adjudication.

In its notice of adjudication, Pilon sought to limit the scope of the adjudication to its interim application and the fact that Breyer had failed to serve a withholding notice. Breyer denied that it was obliged to serve a withholding notice and said that it was entitled to set off the sum of £148,000 in respect of an earlier overpayment.

The adjudicator, Mark Entwistle, decided that he did not have

jurisdiction to consider Breyer's set-off because his jurisdiction was limited to the issues set out in the notice of adjudication. He awarded Pilon £206,600. Breyer refused to pay, arguing that the adjudicator's refusal to consider its defence was a breach of natural justice. Pilon commenced enforcement proceedings in the Technology and Construction Court.

The decision

Coulson J agreed with Breyer and refused to enforce the adjudicator's decision. He said that although mistakes by an adjudicator in reaching a decision will not necessarily be enough to prevent enforcement, it is a completely different matter

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when an adjudicator chooses not to consider an important element of the dispute. Although the set-off was not referred to in the notice of adjudication (and one would not expect it to be), that did not prevent the responding party from raising it in its defence and having it considered by the adjudicator as part of the overall dispute. Coulson J went on to say:

An adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim.

Not only did Pilon's 'devious bit of drafting' fail to exclude Breyer's set-off defence, it also effectively prevented its own defence to Breyer's overpayment argument from being run in the adjudication, and it could not then be considered by the court on enforcement either. Pilon argued that, even if the adjudicator had considered Breyer's set-off defence, he would have

rejected it because Breyer did not serve a withholding notice.

As Coulson J put it:

It seems to me that it is now too late for Pilon to complain about that. It is a direct result of their own deliberate strategy.

Pilon had suggested that the court should give a declaration on the issue, as it had done in *Geoffrey Osborne Ltd v Atkins Rail Ltd* [2009] (see 'TCC to the rescue', *PLJ*247, 29 March 2010, p7), but Coulson J said that, in that case, the parties had agreed that the adjudicator had made a mistake and, as there was no arbitration clause in the contract, the court could give a binding

decision. This was not the case here, where Breyer did not agree with Pilon, and the contract contained an arbitration clause anyway, which meant that only an arbitrator could finally decide the point.

Conclusion

Referring parties should consider carefully the scope of the dispute that they refer to an adjudicator, particularly if they want to refer a narrow or discrete issue. By seeking to exclude Breyer's defence, Pilon not only ended up with an unenforceable decision, but it also never gave the adjudicator the opportunity to consider its own perfectly valid response to that defence, which could not then be raised as an issue before the court. ■

AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWHC 393 (TCC)
Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358
Geoffrey Osborne Ltd v Atkins Rail Ltd [2009] EWHC 2425 (TCC)
Pilon Ltd v Breyer Group plc [2010] EWHC 837 (TCC)