

The Adjudicator's decision is binding on both parties until the dispute is finally decided by arbitration (if provided for in the contract, or agreed to), litigation or agreement (Section 108(3) HGCRA 1996 and paragraph 23(2) of the Scheme for Construction Contracts 1998). The unsuccessful party is required by law to pay a sum of money awarded by an Adjudicator. However, if the unsuccessful party does not pay when required, the successful party may seek a court order by means of summary judgement. Because it is binding the Courts will, in the vast majority of cases, enforce the decision in summary proceedings. Generally the only defence to such proceedings will be that the Adjudicator's decision was made outside his jurisdiction or that there has been a breach of natural justice.

Some recent cases have provided further clarity concerning when a court will enforce an Adjudicator's decision and when it may, on rare occasions, set it aside.

## Unsuccessful challenge

In the recent case Amec Group Ltd v. Thames Water Utilities Ltd (2010), TWUL sought to have the Adjudicator's decision set aside on various grounds including 'jurisdiction', 'breach of natural justice' and 'error'. TWUL argued unsuccessfully that:

- 1 The Adjudicator, having been appointed under the Framework Agreement, did not have jurisdiction to deal with the case relating to individual works orders and that consequently more than one dispute had been referred.
- 2 The dispute was too large and complex for the adjudication process and that the Adjudicator had failed to take account of TWUL's cross claims. The Adjudicator therefore acted in breach of natural justice.
- 3 The adjudicator made an error in his calculations.

In rejecting TWUL's arguments, Mr Justice Coulson concluded that:

- 1 The Parties had acted in accordance with the Framework Agreement making aggregate applications for payment and aggregate withholding notices. There was only one dispute under the Framework Agreement and consequently the Adjudicator did have jurisdiction.
- 2 Size or complexity is, in itself, not sufficient grounds for a breach of natural justice to arise. In this particular case the Adjudicator had, in fact, taken sufficient regard of TWUL's further response, albeit in general terms, and had therefore dealt fairly and properly with the dispute.
- 3 The Adjudicator, having dealt with the bigger picture, was not obliged to go through the thousands of smaller items that made up the cross claim. Subject to the aforementioned, even if the Adjudicator had made an error of calculation, it would not, as a matter of principle, affect the enforceability of his decision.

## Successful challenge

A successful challenge to an Adjudicator's decision was made in Pilon Limited v. Breyer Group plc (2010). The defending party, Breyer, argued their case on a breach of natural justice in respect of the Adjudicator's refusal to consider a possible defence put forward by them. In this case, the referring party had attempted to restrict the dispute and encourage the Adjudicator to take a narrow/restrictive view of the scope of the adjudication, in order (it may be assumed) to gain tactical advantage. The judge said that where an Adjudicator takes an inordinately restrictive view of his jurisdiction and fails to consider an important element of the dispute that has been referred by way of a defence, then this failure is usually considered to be a breach of natural justice. For this to apply however, the Adjudicator's failure must be deliberate and material. The judge found, in this case, that the Adjudicator had erred in failing to take account of Beyer's defence.

## Pitfalls

In many large contracts more than one adjudication, or even a series of adjudications, may take place. How a party acts in one adjudication can have a bearing upon its options in subsequent adjudications. In respect of an Adjudicator's decision, a party cannot both assert that an Adjudicator's decision is valid and at the same time challenge its validity. A party must elect to take one course or the other.

In the case of PT Building Services Limited v. ROK Build Limited (2008), PTB sought enforcement of an Adjudicator's decision. ROK opposed enforcement on a number of grounds. For various reasons, ROK had considered that the Adjudicator did not have jurisdiction but did participate in the adjudication process, reserving its position as to jurisdictional matters. Subsequently PTB issued a second notice of adjudication. In response to the second adjudication however, ROK argued that the second Adjudicator had no jurisdiction, as the dispute referred was the subject of the previous Adjudicator's decision; ROK relied on this argument in persuading the second Adjudicator to resign. The judge considering the enforcement order for the first adjudication, concluded that by relying on the first Adjudicator's decision in persuading the second Adjudicator to resign, ROK had elected to treat the first decision as valid and binding, and that ROK had obtained a clear benefit (resignation of an Adjudicator) by relying on that decision and it could not now challenge it in enforcement proceedings.

A party's action in one adjudication can therefore impact upon his options in subsequent adjudication i.e. a party who elects to accept the benefit under an instrument (such as an Adjudicator's decision) will be bound and prevented from either acting inconsistently with it or from presenting a different argument in subsequent actions.

## Summary

Although considered 'temporarily binding' an Adjudicator's decision can, on rare occasions, be successfully challenged, however the grounds on which this can be done are limited. In summary, these will normally be limited to:

- Jurisdictional grounds. However a party asserting this must state and reserve his position at the outset of the proceedings. He must maintain consistency of this position in subsequent actions or risk the consequences.
- Breach of natural justice.

The dissatisfied party will often believe that the Adjudicator simply got it wrong or made a fundamental error. Unfortunately for a party who finds himself of this mind, errors in law, judgement or in calculation do not, in themselves, invalidate an Adjudicator's decision.

A dissatisfied party can, of course, pursue the next stage in the process and take the matter to arbitration or litigation. He will, however, have to conform with the Adjudicator's decision in the meantime.

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